

(26,565)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 481.

GREAT NORTHERN RAILWAY COMPANY, PLAINTIFF IN
ERROR,

vs.

J. C. CAHILL AND GEORGE REDMAN, COPARTNERS AS
REDMAN & CAHILL, AND THE BOARD OF RAILROAD
COMMISSIONERS OF THE STATE OF SOUTH DAKOTA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF
SOUTH DAKOTA.

INDEX.

	Original.	Print
Appellant's brief on appeal from Circuit Court of Minnehaha County.....	1	1
Complaint.....	1	1
Call and demand by Railroad Commission.....	3	2
Answer.....	4	2
Notice of hearing.....	7	4
Hearing before Board of Railroad Commissioners.....	8	4
Testimony of J. C. Cahill.....	8	4
George Redman.....	14	7
Thomas Street.....	15	7

	Original.	Print
Testimony of J. C. Cahill (recalled).....	17	8
Fred Wellatz.....	18	8
John Chambers.....	18	8
Exhibit A—Statement showing cars of stock billed from Albee, S. D., &c.....	19	9
Testimony of Herbert E. Kendree.....	21	10
Colloquy between counsel and Commissioners, &c.....	25	12
Findings and conclusions.....	31	14
Order of Board of Railroad Commissioners.....	50	22
Hearing in Circuit Court.....	52	23
Findings of fact and conclusions of law.....	53	23
Judgment.....	57	25
Notice of intention to move for new trial.....	59	26
Recital of proceedings for appeal, &c.....	61	27
Assignments of error.....	62	28
Respondent's brief and additional statement.....	70	31
Judgment.....	74	33
Opinion, Smith, J.....	75	34
Application for rehearing.....	82	38
Answer to petition for rehearing.....	86	40
Order denying petition for rehearing.....	90	41
Petition for writ of error.....	91	42
Writ of error.....	94	43
Order allowing writ of error.....	97	45
Bond on writ of error.....	100	46
Assignments of error.....	103	48
Citation and service.....	106	49
Stipulation as to record.....	108	50
Clerk's certificate.....	112	52

1

Complaint.

The complainants above named respectfully represent:

1.

That J. C. Cahill and George Redman are co-partners engaged in the purchase and shipment of live stock of all kinds at the town of Albee, in Grant County, South Dakota, and have their places of residence and postoffice address at Albee, aforesaid.

2.

That the Great Northern Railway Company is a corporation duly organized and existing according to law and is a common carrier engaged in the transportation of passengers and property by railroad within the state of South Dakota, and as such common carrier, is subject to the laws of this state.

3.

That the town or village of Albee in Grant County, South Dakota, is one of the regularly established stations on the line of railway of the Great Northern Railway Company in Grant County, South Dakota, and at Albee there is a regularly established station and a stock yards for the receipt and shipment of live stock in car load lots.

2 That all cattle shipped from the station of Albee in car load lots are shipped over the line of railway of the Great Northern Railway Company, the above named defendant.

That at the stock yards at said station there is not now located any facilities whatsoever, for the weighing of live stock; that there are no scales of any kind located in the stock yards maintained by the defendant railway company at Albee; that the complainants are engaged in the business of buying and shipping live stock at Albee and vicinity and that all cattle bought at Albee are shipped from the stock yards of the Great Northern Railway Company; that the volume of the business in live stock at Albee justifies the installation and maintenance of suitable scales for the weighing of live stock received at and shipped from said station, and there is a great public demand and a public necessity for the establishment by said railway company, of scales for the weighing of live stock at its said stock yards.

Wherefore, complainants demand that a statement of this complaint be forwarded to the said railway company with a call and demand that it satisfy the said complaint by establishing at its stock

yards in Albee proper and sufficient scales for the weighing of live stock received at or shipped from said station, and that in case of failure of the said defendant railway company to satisfy the said complaint by the establishment of such scales, that a hearing and investigation be called on this complaint, and after such hearing and investigation, an order be made and entered in this proceeding requiring the defendant railway company to establish and locate at its stockyards at Albee suitable scales for weighing of live stock, and that complainants and other shippers at Albee have such other and further relief as the Commission may deem proper.

Call and Demand.

To Great Northern Railway Company, the above-named defendant:

You will please take notice, That the complaint in the above entitled cause was filed in the office of the Board of Railroad Commissioners of the State of South Dakota, on the 8th day of February, 1915; that for a true, full and complete statement of the said complaint, together with the damages therein alleged, reference is hereby made to a true copy of the said complaint, which is hereto attached, hereby referred to and made part hereof; and that you are hereby commanded and required to satisfy the said complaint within twenty days after the service of this call and demand upon you, or to answer the same in writing within that time, by filing the original and one copy of said answer in the office of the Board of Railroad Commissioners of the State of South Dakota, and serving, by registered mail, a copy of said answer upon the complainant or his attorney.

Done in regular session at the city of Pierre, the capital, on this 8th day of February, 1915.

By Order of the Board:

[SEAL.]

T. E. CASSILL, *Secretary.*

Answer.

Defendant answering the complaint in the above entitled proceeding:

1.

Admits the allegations contained in paragraphs numbered 1 and 2 of said complaint.

II.

Admits the following allegation contained in paragraph 3 of said complaint, to-wit: "That the town or village of Albee in Grant County, South Dakota, is one of the regularly established stations on the line of railway of the Great Northern Railway Company in Grant County, South Dakota, and at Albee there

is a regularly established station and a stock yards for the receipt and shipment of live stock in car load lots.

"That all cattle shipped from the station of Albee in car load lots are shipped over the line of railway of the Great Northern Railway Company, the above named defendant.

"That at the stock yards of said station there is not now located any facilities whatsoever for the weighing of live stock; that there are no scales of any kind located in the stock yards maintained by the defendant railway company at Albee; that the complainants are engaged in the business of buying and shipping live stock at Albee and vicinity."

III.

Denies any knowledge or information of the following allegation contained in said paragraph 3 of said complaint:

"That all cattle bought at Albee are shipped from the stock yards of the Great Northern Railway Company."

IV.

Denies the following allegation contained in paragraph 3 of said complaint, to-wit: "That the volume of the business in live
6 stock at Albee justifies the installation and maintenance of suitable scales for the weighing of live stock received at and shipped from said station, and there is a great public demand and a public necessity for the establishment by said railway company, of scales for the weighing of live stock at its said stock yards."

V.

Alleges that a stock yard scales such as complainants in this matter seek to have installed by defendant is not an instrumentality of shipment or carriage and is not included within the term "transportation" as defined by Section 1 of Chapter 207 of the Session Laws of the State of South Dakota of the year 1911, and is not a facility for receiving, forwarding and delivering by a common carrier of property to and from its lines and to and from other lines connected therewith; that said scale is a mere convenience as between a local buyer and seller of live stock; that it is used for the sole purpose of facilitating the consummation of business transactions between buyers and sellers of live stock on the basis of weight, and that it is not used and would not be used at defendant's said station at Albee for any purpose connected with the transportation by defendant of property.

7

VI.

Alleges that shipments of live stock from said station of Albee are made and the freight charges therefor are computed upon a basis not requiring the use of a stock yard scale at said station; that live

stock transported by defendant from said station is loaded into a car subject to tariff minimum weights and when said car arrives at the terminal live stock market, its destination, the live stock so transported is there weighed upon track scales and the weight so ascertained is the basis for freight charges.

VII.

Alleges that an order such as complainants seek to have entered in this proceeding would be in violation of the provisions of Section 2 and 13 of Article 6 of the Constitution of the state of South Dakota, and of Articles 5 and 14 of the amendments of the Constitution of the United States of America, would be an unreasonable and unwarranted taking of defendant's property without due process of law and without compensation, and would be denying to defendant the equal protection of the law.

Wherefore, defendant prays that complainant's petition be dismissed.

Notice of Hearing.

8 Said cause being at issue was set down for hearing before the board of railroad commissioners of the State of South Dakota, at Albee, on May 20, 1915. A notice of said hearing was issued on May 10, 1915, and duly served upon the defendant.

Hearing Before the Board.

On May 20, 1915, a hearing was held before the board of railroad commissioners at Albee, South Dakota, at which time and place the complainants appeared in person, and the defendant appeared by its attorneys, Messrs. Aikens & Judge, whereupon the following proceedings were had and the following testimony was taken:

J. C. CAHILL being called as a witness on behalf of complainants and being interrogated by Mr. Dougherty, testified as follows: I reside at Albee, and am there engaged in the business of buying and selling live stock, and am a member of the firm of Redman & Cahill. Have been engaged in business about two and a half years. We have had stockyards at this station at least twenty years, but there are no stock scales and have never been any stock scales at this station belonging to the railway company. At one time my brother, Pierce Cahill, put in a scale of his own when he was in business here.

9 We have requested the railway company to put in stock scales. We made this request to a gentleman named Jackson, I believe, the general traffic manager. Sometime in January, this year, I wrote him and immediately received an answer stating that such facility was not required by law. I have not his communication with me. Last year we shipped about twenty car-

loads of stock, that is, between March 30, 1914, and March 30, this year. That includes one or two carloads we shipped from Nassau, Minnesota. These shipments consisted of cattle and hogs and some sheep; about three-fourths of the shipments were hogs.

We require stockyard scales at this station for our convenience, and for the convenience of the patrons of the railroad company. We find that when we have to weigh here and there, wherever we can, the patrons are not satisfied. In case any argument arises in regard to the weights, we have no way of proving without loading up again, which is practically impossible. We do not buy in carloads so there would be no way of determining by carload weights the amount of stock bought from any individual. We buy by the weight and also on hoof. We find buying on the hoof most satisfactory, and we buy that way whenever we can, and people here are

not stockmen and they don't like to take the chances. The
10 most satisfactory way to the producer is buying on the scale.

We think we should have a scale of about six tons capacity. A Fairbanks or a Howe scale would be my choice. In regard to the scale, cattle especially, it is almost impossible in the way of buying cattle, to do business without a scale. The only way we can weigh them is to drive them into the stockyard and lasso each one and take them across the street to the scale we have been using. This is a scale belonging to Mr. Fogelsang, a coal dealer down here. It is about 200 feet from the stockyards, just across the right of way.

Cross examined by Mr. Judge, this witness further testified: I think I started in business in the Fall of 1912. I am familiar with the way in which freight rates on stock shipments are compiled. I think the method is of weighing the load over a track scale, and then weighing back the empties and charging for the net weight. This weighing is done on track scales at the terminal point; I believe that is the uniform practice. We ship practically all of our stock to South St. Paul, Minnesota. We have made no shipment of stock in carload lots to any point in South Dakota. The only way I can arrive at values of the stock is by weighing them. That is the
value we allow the seller. There are lots of times we have

11 two or three carloads of stock in the yards at one time, and there may be a thirty-three foot car and a forty-four foot car, and in order to get the correct weights in each one so as to not have one overloaded and one underloaded, the only way is to weigh up the stock so as to load the cars to their capacity. It is not a fact that in loading for shipment we ordinarily endeavor to load in a car just a sufficient number of animals so there is no danger from crowding or suffocation. For instance, when we ship a thirty-three foot car, we have to pay for 16,000 pounds, whether it is there or not, and of course, we like to get 16,000 pounds in it. Sometimes the car appears to be overloaded, when in reality it is not, before the animals get their places. I would not put 16,000 pounds in the car if I thought that would be dangerous to the stock. You cannot get over 16,000 pounds in the car without overloading it. I am certain about that, especially in warm weather. Of course, the size of hogs and their weight cut a big figure in regard to that. No sir, I can-

not tell before I load them, about the weight of the stock, whether or not they are properly loaded in the car, but I can after I get them loaded. The main thing with me is to guard against overloading and underloading because it costs just the same to ship, whether it is there or not. It is not an easy matter for me to determine from my experience as a stockman whether a car is underloaded or not. I can get somewhere near it. If we could keep each man's stuff separate as it comes in, we could get at it quite closely, but the stock is mingled and we don't know where we are at in regard to weights. We pay more attention to the condition of the car as to overcrowding than we do as to weights, but I find when we load the car up to where we think it is to be loaded and get the second car down to the chute, I find the first car is too heavy or too light. I can't see that it is loaded more than the second car, but it is. That I determine from the crowded condition of the car. If we had a stockyard scale, by being careful in weights, we could tell exactly. Whether I would put in an extra steer or not if I were loading a 16,000 pound car and found that I had 16,000 pounds in it and the car was not crowded, would depend upon my gross weights. If it was the last critter in the yard I would put it in the car if it appeared that he will be comfortable and safe.

Quite often we have mixed stuff, cattle and hogs. We have to load our cattle first, and they probably take up half or more of the car; then we put up the partition, run the hogs in and find we don't have room and we have to take the hogs out, take the partition down, take the cattle out and leave the cattle and ship them in another shipment. If we had a scale so as to determine that fact in advance, it would obviate such trouble. I have had that occur here and at Nassau several times. We had a scale at Nassau, and knew what we were at and hired the stuff hauled up here so as to correct that condition. I don't believe that hoof scales are used as a means of determining weights upon which freight charges are based.

Further interrogated by Mr. Dougherty the witness testified:

I think the minimum weight on hogs in a thirty-three foot car is 16,000 pounds, and on cattle it is 20,500 pounds, and the same for a mixed carload of cattle and hogs. I use stock scales in ascertaining whether I get the capacity of the car loaded. I know of stations in this state along the line of the Great Northern road where they have stock scales. There are stock scales at Nassau, Minnesota. I have not been at Watertown. I know to some extent what the fact is on other lines of railroad in this state. I have visited these stock yards and seen the scales. The practice is uniform on the part of carriers to furnish stockyard scales at their stockyards at their stations in this state. The carriers have provided scales for weighing stock at their stockyards at Revillo on the M. & St. L., and at Milbank and Big Stone on the C. M. & St. P. and also at Marietta on the St. Louis. Those are our competitive points.

GEORGE REDMAN being called as a witness on behalf of the complainant and being interrogated by Mr. Dougherty testified as follows: I am one of the complainants in this case; am a member of the firm of Cahill & Redman and reside at Albee, South Dakota. I think I started buying stuff here in 1910. It is true as testified by Mr. Cahill that at one time his brother had a stock scale here. There has never been to my knowledge a scale put in at this yard by the railway company. It is more convenient for us and for the man we buy it from to have a scale here on account of weighing back and forth from wagon scales, especially in muddy weather, you can't tell whether you are buying stuff just right or not because there are times when a wagon will pick up more mud with a load off and on than at other times. It would also be handy in the way of loading of cars as Mr. Cahill stated, and when you have more than one load so as to get your stock divided that it will ride comfortably.

15 I recall two times when there were parties at Watertown who would like to have bought hogs from us here, but we were unable to sell to them on account of not having any way to weigh them. There are stockyards in Watertown, and I think there are stock scales at the yards. The railway company has stock scales at South Shore. The St. Louis has stock scales at Revillo, Marietta and Strandburg that I know of; the Milwaukee has scales at Twin Brooks, Milbank, and Big Stone; the Northwestern has a scale at Altamont; all of those stations are our competitors. The testimony given by Mr. Cahill as to the necessity of a scale here is substantially correct.

Cross examined by Mr. Judge, this witness testified as follows: These difficulties would be eliminated if we had a stock scale of our own. There is no city scale here.

THOMAS STREET being called as a witness on behalf of complainant and being interrogated by Mr. Dougherty testified as follows: I reside three and a half miles southeast from Albee on a farm I raise and sell hogs and cattle. Albee is my principal trading point, but I trade some at Revillo. I have sold cattle and hogs at Albee. Some of these I have sold to different parties, Cahill and Redman

16 and others, and I have shipped a great many carloads myself, that is my own stock, and sometimes the stock of my neighbors. We ship together from this station. I have shipped for the last thirteen or fourteen years, three or four cars. There were stock scales at this station for a short time that belonged to Pierce Cahill, but there has never been a railway company scale here. The principal reason why there should be stock scales at the stockyard at Albee is in buying cattle. It is almost impossible to take a herd of wild cattle and put them on a common scale like they have here at Mr. Foglesang's; you can't lead them or hold them steady enough to weigh them on those scales. You need sort of a box around the scale so you can inclose the cattle and keep them on while you weigh them. I have not loaded stock at any station except this one. I think the scales at Nassau and Revillo were put in by the railway companies because you can drive the stock there from the yards on to them or back into the yards over them. I

would rather sell stock to a buyer where there is a scale at the stockyards because they weigh them up better. I am more satisfied with scale weights than selling on the hoof.

Cross examined by Mr. Judge, this witness testified: The scale facilitates business between the purchaser and the seller. I ship stock to South St. Paul, Minnesota. I have never shipped
17 any livestock from here to any point in South Dakota. Most all of the farmers around here are engaged in raising cattle and hogs and are going into that business more and more.

J. C. CAHILL recalled on behalf of complainant and being interrogated by Mr. Dougherty testified as follows:

Q. You made some statement with reference to the buying at stockyards resulting in a discrepancy of weights?

A. Yes sir; as an illustration, we put some hogs that were bought from a fellow southeast of here in our car the last time we shipped; in this instance, there was an apparent mistake in these weights made on Mr. Foglesang's scale. It looked like a mistake to the farmer, and also looked like a mistake to me and the only thing we could do was to reload this entire bunch of hogs and we weighed them all, and on account of his growing suspicious, we had to load them on to one other scale, the scale of the Northwestern Elevator. We found a mistake in the scale, not the first one we weighed them on, but the other, and we then corrected the mistake.

I am familiar with the situation here and know that the farmers are engaged in the business of raising hogs and cattle generally, and that business is still increasing.
18

FRED WELLATZ called as a witness on behalf of complainants and interrogated by Mr. Dougherty testified as follows: I am a farmer and live just a mile north of town. Albee is my regular trading point. I raise hogs and cattle and sheep. For the most part I sell this stock to Mr. Cahill and Mr. Redman. I do not ship any myself. We ought to have a stockyard scale at Albee, because we have so much bother with these scales here when we weigh sometimes at one scale and sometimes at another scale, and the fellows are kicking on it. We sell altogether by weight. I would sooner sell by weight and am better satisfied selling that way. Our hogs and cattle are weighed on Mr. Foglesang's scale, and sometimes on the lumber yard scale.

JOHN CHAMBERS called as a witness on behalf of defendant and interrogated by Mr. Judge, testified as follows:

I am station agent of the Great Northern Railroad Company at Albee; have had this position eighteen years. Exhibit "A" is a statement of the number of carloads of stock shipped from this station for the last three years. I have prepared it, and it shows correctly all carloads of stock shipped from this station during the
19 years 1912, 1913 and 1914. All of this stock went to South St. Paul, Minnesota.

Exhibit "A" referred to by the witness is as follows:

EXHIBIT "A."

Great Northern Railway Company, Willmar Division.

*Statement Showing Cars of Stock Billed from Albee, S. D., During
the Three Years Ending April, 1915.*

1912.

May 1912.....	2 cars
June, 1912.....	2 cars
July, 1912.....	4 cars
Aug. 1912.....	1 car
Sept. 1912.....	1 car
Oct. 1912.....	0 cars
Nov. 1912.....	0 cars
Dec. 1912.....	1 car
Jan. 1913.....	1 car
Feb. 1913.....	2 cars
March, 1913.....	2 cars
April, 1913.....	2 cars
	<hr/>
	18

1913.

20	May, 1913.....	1 car
	June, 1913.....	2 cars
	July, 1913.....	1 car
	Aug. 1913.....	0 cars
	Sept. 1913.....	0 cars
	Oct. 1913.....	2 cars
	Nov. 1913.....	1 car
	Dec. 1913.....	0 cars
	Jan. 1914.....	1 car
	Feb. 1914.....	1 car
	March, 1914.....	1 car
	April, 1914.....	2 cars
		<hr/>
		15

1914.

May, 1914.....	1 car
June, 1914.....	2 cars
July, 1914.....	3 cars
Aug. 1914.....	2 cars
Sept. 1914.....	1 car
Oct. 1914.....	2 cars
Nov. 1914.....	2 cars
Dec. 1914.....	1 car
Jan. 1915.....	4 cars
Feb. 1915.....	1 car
March, 1915.....	2 cars
April, 1915.....	2 cars
	<hr/>
	23
21 Total	56 cars

The foregoing exhibit was offered and received in evidence.

Witness continues: I should say rather that this is a statement of stock shipped from and including May, 1912, to and including April, 1915. During the time mentioned in the exhibit there have been no carload shipments of livestock from this station to any point in South Dakota. There were a couple of single critters carried to Bancroft, South Dakota, but that is all. I do not know upon what weights the rates for shipping livestock in carload lots are determined.

HERBERT E. KENDREE called as a witness on behalf of defendant and interrogated by Mr. Judge, testified as follows:

I am traveling freight agent of the Great Northern Railway Company, and have been in railroad work for eighteen years. I was agent at Watertown up to December, 1912. The weights on livestock for determining the rates on carload shipments are determined by the scale weights or track scale weights at destination. That is the uniform practice of ascertaining such weights. I do not know that transportation charges are ever based upon weights ascertained by weighing upon hoof scales. The tariffs provide a minimum car capacity, and the freight rates are based upon that minimum capacity. There are also minimum weights upon which the rates for a shipment of a single animal are based. I have never known stockyard scales to be used for any purpose connected with transportation of livestock, nor for the purpose of determining the weights of livestock upon which freight charges are based. Such scales are generally used for the benefit of shipper and buyer for their convenience in ascertaining the weights for which the buyer pays and makes settlement, and not for railway purposes. When livestock is loaded the loading is subject to tariff minimum weights at destination.

Cross-examined by Mr. Dougherty, the witness testified:

I can't tell you what other stations in this state on the line of the Great Northern Railway Company have stockyard scales located by the company. There are stockyards, but no scales at Watertown. If Mr. Cahill wanted to ship a single animal from Albee to Watertown, that exceeded the minimum weight, the freight charge would be based upon the minimum.

Q. So that no matter what the weight of the animal might be, the minimum weight would fix the rate?

23 A. That has always been my way of handling it.

Q. Assuming that Cahill & Redman loaded two or more cars of livestock at this station destined to South St. Paul, and as Mr. Cahill has outlined, they use the stockyard scale in loading the stock in the car and the cars are wrecked at a point between here and South St. Paul, what do you say as to the weights at the originating station entering into the final settlement between the shipper and the railway company?

A. I don't know; that is too deep for me.

Witness continued: I have not had any such experience since I have been traveling freight agent. The contract entered into at the time the stock is shipped fixes the minimum car capacity. A minimum established on any shipment of livestock is simply and wholly for the purpose of fixing the minimum car lading, and where the lading exceeds the minimum, the freight charges are based on actual weight.

Further interrogated by Mr. Judge, the witness testified:

The final weight is determined at destination on track scales. I know of no necessity for the installation of a stock scale at Albee, so far as railroad transportation is concerned, and there could not in my opinion nor as far as I can see, so far as the company is
24 concerned, be any such necessity.

Thereafter on October 8, 1915, the complainants applied to the board of railroad commissioners for leave to incorporate into the record and have received therein as evidence and attached to and made a part of the record in this cause, statements made up from the files in South Dakota Railroad Commission Docket number F. 213, showing the stations at which stockyard scales have been established in this state by the following railroad companies, to-wit:

Chicago, St. Paul, Minneapolis & Omaha.

Chicago & Northwestern.

Chicago, Milwaukee & St. Paul.

Minneapolis, St. Paul & Sault Ste. Marie.

Great Northern Railway.

Minneapolis & St. Louis.

Chicago, Rock Island & Pacific.

South Central and H. S. Stebbins, as receiver of the South Dakota Central, and the Illinois Central.

On the said 8th day of October, 1915, the board of railroad commissioners made and entered an order in this matter setting down for hearing the said application of complainants before the
 25 board of railroad commissioners at Pierre, South Dakota, on October 28, 1915, at ten o'clock in the forenoon. Notice of the said hearing was served upon the attorneys for defendant railway company.

On the said 28th day of October, 1915, before the board at its office in Pierre, the defendant appeared by Messrs. Aikens & Judge, its attorneys, and the board of railroad commissioners appeared by Oliver E. Sweet, its counsel, who also entered appearance on behalf of the complainants. The following proceedings were thereupon had:

Mr. Sweet: Application is hereby made on behalf of the complainants for permission to introduce in evidence and attach to and make a part of the record in this cause, statements furnished to the board of railroad commissioners by the carriers, containing lists of scales with the name of the station, number of scales, installed, capacity of each and name of manufacturer, provided by the carriers at their stock yards at stations on their lines in this state.

Mr. Judge: Defendant objects to the reception in evidence in this matter of the various statements of stock yards scales used
 26 in South Dakota, attached to the application of complainant and offered in evidence, because the same are immaterial, irrelevant and incompetent; they do not tend to establish any fact properly at issue in this proceeding; they are not the best evidence, and no proper foundation has been laid for their reception in evidence. This objection is made to each and every of said statements offered in evidence.

Commissioner Dougherty: The objection is overruled and the application granted.

The statements referred to in said proceedings and made a part of the record in this case show the following facts.

The statement of stockyard scales used in South Dakota, on lines of the Chicago, St. Paul, Minneapolis & Omaha Railway Company, shows one Howe scale of 7500 pounds capacity at each of the following stations: Valley Springs, Brandon, Ellis, Hartford, Humbolt, Montrose, Spencer, Farmer, Fulton, Mitchell.

The statement of stockyard scales on lines of the Chicago and North Western Railway Company in this state show such scales of different manufacture and capacity at the following stations: Altamont, Alcester, Agar, Arlington, Aurora, Athol, Aberdeen,
 27 Astoria, Broadland, Burkmere, Blunt, Bruce, Beresford, Brookings, Box Elder, Castlewood, Conde, Crandon, Clark, Carthage, Columbia, Cavour, Canova, Canistota, Centerville, Cottonwood, Capa, Dempster, Doland, Elrod, Elkton, Estelline, Ferney Frankfort, Faulkton, Fort Pierre, Gettysburg, Gorman, Groton, Grant, Gary, Goodwin, Hooker, Houghton, Henry, Hitchcock, Huron, Highmore, Holabird, Harrold, Hecla, Hetland, Hurley Belle Fourche, Bonesteel, Burke, Colome, Dallas, Fruitdale, Fairfax,

Gregory, Hot Springs, Herrick, Nisland, Newell, St. Charles, Winner.

The statement showing stock yard scales on the Puget Sound lines of the Chicago, Milwaukee & St. Paul Railway Company in this state is as follows:

Office of Vice-President,

Seattle, July 26th, 1915.

Mr. T. E. Cassill, Secretary South Dakota Board of Railroad Commissioners, Pierre, South Dakota.

DEAR SIR: In compliance with resolution recently adopted by your honorable Board, please be advised that on the Puget Sound Lines of the Chicago, Milwaukee & St. Paul Railway we have
28 but two stockyard scales in South Dakota—one at La Plant and the other at Walker, both manufactured by Fairbanks, Morse & Company and of four tons capacity each.

Yours truly,

H. B. EARLING,
Vice-President.

The statement of stockyard scales on the lines of the Chicago, Milwaukee & St. Paul Railway in South Dakota, shows 4 tons scales of the Fairbanks-Morse manufacture at the following stations: Egan, Coleman, Wentworth, Junius, Winfred, Howard, Vilas, Roswell, Fedora, Artesian Forestburg, Lane, Wessington Springs, Madison, Ramona, Oldham, Lake Preston, Erwin, Bryant, Vienna, Naples, Elrod, Garden City, Bradley, Lily, Butler, Flandreau, Canton, Worthing, Lennox, Chancellor, Parker, Marion Jet., Dolton Bridge-water, Emery, Alexandria, Burton, Mt. Vernon, Plankinton, White Lake, Kimball, Pukwana, Freeman, Menno, Scotland, Blaha, Tyn-dall, Springfield, Running Water, Loomis, Letcher, Cuthbert, Woon-socket, Alpena, Virgil, Wolsey, Bonilla Tulare, Redfield, Ashton, Mellette, Duxbury, Warner, Westport, Barnard, Frederick, White Rock, Andover, Pierpont, Lake Andes, Geddes, Platte, Langford, Britton, Newark, Milbank, Corona, Wilmot, Sisseton, Mina, Ips-wich, Roscoe, Hosmer, Hillsvew, Eureka, Oacoma, Reliance,
29 Kennebec, Presho, Vivian, Draper, Murdo, McKenzie, Bel-videre, Chamberlain, Bristol, Greenway, Loyalton, Millard, Faulkton, Orient, Twin Brooks, Marvin, Summit, Örtley, Waubay, Webster, Groton, Bath, Bowdle, Java, Selby, Glenham, Jefferson, Elk Point, Burbank, Vermillion, Meckling, Gayville, Fullerville, Yankton, Utica, Lesterville, Kaylor, Tripp, Parkston, Dimmock, Ethan, Fairview, Harrisburg, Renner, Morefield, Colton, Huntimer, Saranac, Baltic, Dell Rapids, Trent, Delmont, Armour, Corsica, Stickney, Tabor, Hudson, Avon, Dante, Wagner, Ravinia; and a 20 ton Fairbanks-Morse scale at Aberdeen and a 50 ton Fairbanks-Morse scale at Mitchell.

The statement of stock yard scales in South Dakota, on lines of the Minneapolis, St. Paul & Saulte Ste. Marie Railway Company shows Fairbanks-Morse scales of 6 ton capacity at each of the follow-

ing stations: Artas, Herreid, Pollock. There are no scales in stock yards on the Veblen line.

The statement of stock yard scales in South Dakota, on lines of the Great Northern Railway Company shows scales of Fairbanks-Morse manufacture and of 6 ton capacity at each of the following stations: La Bolt, South Shore, Hazel, Willow Lakes, Burch, Amherst, Claremont, Putney, Sherman, Garretson, Booge, Corson Tea, Lennox, Davis, Viborg, Irene, Volin Mission Hill.

The statement of stock scales on lines of the M. & St. L. R. R. in the state of South Dakota, shows Fairbanks-Morse scales of different capacity at each of the following stations: Revillo, Troy, Strandburg, Watertown, Florence, Bradley, Wallace, Crocker, Crandall, Conde, Northville, Brentford Cresbard Tolstoy, Hoven, Stratford, Nahon, Aberdeen, Leola.

The statement of stock scales on lines of the C. R. I. & P. Ry. Co., in South Dakota, shows such scales of the Howe and of the Fairbanks-Morse manufacture and of 4 ton capacity at each of the following stations: Sioux Falls, Ward, Elkton, Bushnell, White, Toronto, Brandt, Clear Lake, Bemis, Watertown.

The statement of stockyard scales located on the line of the South Dakota Central Railway in this state shows such scales of different manufacture and different capacity at each of the following stations: Crooks, Lyons, Colton, Chester, Wentworth, Rutland, Nunda, Sinai, Arlington, Badger, Lake Norden, Hayti, Thomas, Watertown.

The statement of stock yard scales on lines of the Illinois Central Railroad Company in this state shows such scales of the Illinois Central Railroad Company's manufacture and 6 ton capacity at each of the following stations: Sioux Falls, Rowena, Ben Clare.

Findings and Conclusions.

The complaint in this case is for the installation of stock scales or facilities for the weighing of live stock received at and shipped from the station of Albee on the line of railway of the Great Northern Railway Company in Grant County, in this state. The hearing was held at Albee before Commissioners Murphy and Dougherty. The complainants appeared in person and the defendant appeared by Messrs. Aikens & Judge, its attorneys, Mr. J. A. McKennon, its division superintendent, and Mr. H. E. Kendree, its division freight agent.

From the testimony in this record it satisfactorily appears that the defendant maintains at Albee a station and station agent, and has installed stockyards at that place; that Albee is situated in a community where the farmers are raising live stock, and the production of live stock is increasing from year to year; that the use of a stock scale is desired by complainants for the purpose of weighing live stock received into the yard from the farmers as the basis for settlement between complainants as buyers and shippers of live stock and the farmers from whom they purchase live

stock, and also for the purpose of weighing live stock before loading into the cars preparatory to shipment; that for this purpose a scale suitable for the purposes of weighing hay, coal and live stock, of a capacity not to exceed six tons, is required, and that the Fairbanks-Morse scale or the Howe scale are of the class commonly used for this purpose. That practically all stock shipped from the station of Albee is destined to South St. Paul.

Mr. J. C. CAHILL, while on the witness stand being interrogated as to the purposes for which the scale was desired, testified as follows:

Q. The purpose for which you desire a stock scale installed is in order to enable you to adjust matters between you and persons from whom you purchase the stock, is it not?

A. That is the only way I can arrive at values, is by weighing them.

Q. That is the value which you allow the seller?

A. Yes sir.

Q. That is practically the only purpose for which a stock
33 yard scale would be used?

A. No sir, there are lots of times when we have two or three carloads of stock in the yards at once, and one may be a 33 ft. car and one a 44 ft., and in order to get the correct weights in each one so as to not have one overloaded and one underloaded, the only way is to weigh up the stock so as to load the cars for their capacity.

Q. Loading stock for shipment, ordinarily you endeavor to load in a car just a sufficient amount of animals so there will be no danger from crowding or suffocation? Is that not what you have in mind principally?

A. No—for instance, when you ship a 33 ft. car you have to pay for 16,000 lbs. whether it is there or not, and of course, I like to get 16,000 lbs. in it. Sometimes the car appears to be overloaded when in reality it is not, before the animals get their places.

Q. You would not put 16,000 lbs., in if you thought that would be dangerous to the stock?

A. No sir.

Q. If you thought you could put in more than 16,000 lbs. without danger to the stock, you would do that ordinarily?

A. No, you cannot get over 16,000 lbs. in the car without overloading it.

34 Q. Certain about that, are you?

A. Yes sir; especially in warm weather. Of course, the size of the hogs and their weights cut a big figure in regard to that.

Q. You can determine as a stock man, about the weight of the stock before loading in the car—whether you are properly loading the car can't you?

A. Not before I load them, no sir.

Q. You can during the process of loading?

A. I can after I get them loaded, yes.

Q. The main feature with you to guard against is overloading?

A. Yes, and underloading them, too, because it cost just the same to ship it whether it is there or not.

Q. But from your experience as a stock man, it is very easy for you to tell whether a car is underloaded or not?

A. No, it is not an easy matter.

Q. Even if it is a difficult matter, can you tell it ordinarily?

A. I can get somewhere near it. Of course, if we could keep each and every man's stuff separate as they come in we could get it quite closely, but they mingle and we don't know where we are at in regard to weights.

Q. You do, however, pay more attention to the condition
35 of the car as to overcrowding than you do as to weights?

A. Yes, but I find where we load car up to where we think it is to be loaded and get the second car down to the chute, I find that the first is too heavy or too light; I can't see that it is loaded heavier than the second car, but it is.

Q. In other words, you determine that from the crowded condition of the car entirely?

A. Yes sir.

Q. That is a feature that you can't determine by the exercise of care, I take it?

A. By being careful in weights. If we had a stockyard scale we could get it nearly exact.

Q. Supposing you had a stockyard scale and were loading a 16,000 lb. car, for instance you get 16,000 lbs. in it, you should find plenty of room to put in another steer without crowding the car, you would put that steer in, would you not?

A. That would depend upon my gross weights. That would not matter at all if we were not going to use another car any way.

Q. Let us suppose a condition where your shipment is complete with the exception of one or two head of cattle and you could ship
36 at least one more head without danger of crowding, even though that car is then loaded to the minimum capacity, you would put that other animal in?

A. Yes, if it was the last critter in the yard I surely would if it showed that he would be comfortable and safe.

Q. That is the greatest danger that you guard against?

A. Quite often we have mixed stuff, cattle and hogs. We have to load our cattle first in a case of that kind. Probably take up half or more of the car. We have loaded the cattle, put the partition up, and then run the hogs in and find we did not have room at all, and we had to take the hogs out, take the partition down and take the cattle out and leave the cattle and ship in another shipment. If we had the scale so as to determine that in advance, we could obviate that trouble. We have had that occur both here and at Nassau. That has occurred several times. We had a scale at Nassau and knew what we were at and hired the stuff hauled up here so as to correct the condition.

Q. Hoof stock scales are not used, are they, as a means of determining weights upon which freights rates are based, to your knowledge?

A. No sir, I don't believe that they are.

Mr. REDMAN while on the witness stand testified as follows:

37 Q. Go on and state in your own language why in your opinion stock scales is necessary or desirable at the stock-yards at this station of Albee?

A. It is more convenient for us and for the man we buy from to have a scale here on account of weighing back and forth from wagon scales especially in muddy weather, you can't tell whether you are buying stuff just right or not because there are times when a wagon will pick up more mud with a load off or on than at other times. Also it would be handy in the way of loading the cars as Mr. Cahill stated and where you have more than one load so as to get your stock divided so that it will ride comfortable. I have found two times when there was parties at Watertown who would like to have bought hogs from us here and we were unable to sell them on account of not having any way to weigh them.

The testimony of the other witnesses, including those appearing for the railway company, is to the effect that the only use to which a stock scale is put is for the accommodation and convenience of stock buyers and persons making sales of live stock to the buyers at stock-yards in arriving at the weights as to the basis for the purchase and sale.

38 An examination of the tariff of the Great Northern Railway Company, G. N., I. C. C. No. A-882, G. N. Ry. G. F. G. 7700 of 1902, effective August 15, 1902, discloses that the dimensions of cars and minimum weights are as follows:

Dimensions of cars.	Cattle or sheep.	Hogs (single deck.)
Cars not exceeding 30 feet in length (inside measurement)	19,000	15,000
Cars over 30 feet and not exceeding 33 feet in length (inside measurement).....	20,500	16,000
Cars over 33 feet and not exceeding 36 feet in length (inside measurement).....	22,000	17,000
Cars over 36 feet and not exceeding 40 feet in length (inside measurement).....	24,000	19,000
Cars over 40 feet in length	26,000	21,000

An examination of the same tariff also discloses that the rate on live stock, except horses and mules, from Albee to South St. Paul, is $17\frac{1}{2}$ ¢ per hundred weight.

Since the hearing there has been incorporated into the record a copy of the stockyard scale list of this board used in connection with the inspection of scales, as to which jurisdiction was conferred upon this board at the last session of the legislature. This scale list is composed of a statement by each of the railway companies doing business in this state, showing the name of the station, the number of scales installed at the stockyards at such station, the capacity thereof, and the name of the manufacturer. An examination of this list discloses that there are approximately three

hundred stockyard scales on the lines of the different carriers in this state, as follows:

- Chicago, Milwaukee & St. Paul Railway, 152.
- Chicago & Northwestern Railway Company, 67.
- Chicago, St. Paul, Minneapolis & Omaha Ry. Co. 10.
- Minneapolis, St. Paul, & Sault Ste. Marie Ry. Co. 3.
- Great Northern Railway Company, 19.
- Minneapolis & St. Louis Railroad Company, 21.
- Chicago, Rock Island & Pacific Railway Co., 11.
- Illinois Central Railroad Company, 3.
- South Dakota Central Railway Co., H. S. Stebbins, Receiver, 14.

40 All of the scales installed by the Chicago, St. Paul, Minneapolis & Omaha Railway Company are of a capacity of 7,500 lbs. Those installed by the Chicago & Northwestern Railway Company vary from 5,000 to 11,000 lbs.; the majority of them 8,000 lbs. Those installed by the Chicago, Milwaukee & St. Paul Railway Company with the exception of Aberdeen where there is a twenty ton stockyards scale, and at Mitchell where there is a fifty ton stockyards scale, have a capacity of four tons each. Those installed by the Soo Line have a capacity of six tons each; those installed by the Great Northern Railway Company have a capacity of six tons each; those installed by the Minneapolis & St. Louis Railroad Company vary from four thousand to ten thousand pounds, but by far the greater number have a capacity of 8,000 lbs. The Chicago, Rock Island & Pacific Railway Company has installed stockyard scales of a capacity of four tons.

The scales installed by the South Dakota Central Railway Company range from 5,000 to 90,000 lbs., while those of the Illinois Central Railway Company are uniformly six tons each.

It is contended by the Great Northern Railway Company that under the rule laid down in the Great Northern Railway Co., vs. The Minnesota Railway & Warehouse Commission, 122 Minn. 55;

41 141 N. W. 1102; 238 U. S. 340, 35 Sup. Ct. Rep. 753, this board is without jurisdiction to order the construction of a stockyards scale at defendant's stockyards at the station of Albee, in this state, because the scale is used, not as a basis for the fixing of the freight charges, not as a basis for any service in any manner affecting the transportation of live stock, but solely and only for the purpose as between the stock buyer and the producer of live stock of determining the weights as the basis of settlement for the purposes of purchase and sale, and that an order by this commission requiring the installation of a stockyards scale at Albee would be tantamount to a taking of its property without due process of law, and would deny to it the equal protection of the law under the provisions of our state and federal constitutions.

In the early history of the transportation of live stock the railway companies recognized the necessity of the installation of a stockyards scales at stations where the livestock was received for shipment. It is a matter of common knowledge in this state that stock scales are uniformly established by railway companies at stockyards for the

convenience of the public in weighing live stock into the stockyards, whether the scales be used in that respect by stock buyers in making settlement with their customers or by individual shippers who

42 ship stock in carloads. It is also a well recognized fact, commonly understood, that there are large numbers of persons within this state who ship and sell their own live stock and have no transactions whatever with stock buyers. While it is true that where stockyards scales are installed they are used as the basis for settlement between the buyer and his customers, it is also true that they are likewise used by individual shippers for the purpose of weighing their live stock into the stockyard prior to shipment to the ultimate markets. The stock buyers themselves and individual shippers desire to inform themselves as to the weight of the live stock which they are about to load onto the cars for transportation, and while it is true that destination weights, if correct, govern generally in fixing the freight charges on both carload and less than carload freight, it has uniformly been the custom ever since the shipment of live stock began to take the weights at points of origin. The carriers themselves, in the absence of weight agreements with the Western Weighing & Inspection Bureau, weigh all less carload freight before loading it into the cars, although on less than carload freight the agent at the destination is responsible for the delivery at proper weights and proper rates. There is no more reason why less than carload freight

43 should be weighed at point of origin and destination than there is that live stock should be afforded this same facility.

Again, under the tariffs of the defendant in this case, the minimum weight on live stock varies with the size of the car, and there is uniformly a lower minimum on hogs than on cattle or sheep, for reasons which are quite apparent. It is necessary for the shipper to load at least the minimum weight into the cars if he would avoid the paying of freight on that which is not contained in the car, and where a number of carloads are to be loaded, unless the total live stock to be shipped has been weighed into the yard, it may frequently become necessary for the shipper to use the scale in arriving at the weights to be loaded into each car. In fact, the testimony in this record shows that such instances have arisen at Albee, and that scales are necessary not only for weighing the stock purchased from farmers, but also for the proper loading of the stock into the cars. It may be true that the cars could be loaded without the stock scales, but it is also true that the cars could be loaded without stockyards, although the courts have uniformly held that stockyards are a necessary facility for the handling of live stock at points where loaded and unloaded. In fact, it has been held that stockyards constitute a

44 carrier's live stock depot, the same as freight warehouses constitute the carrier's freight depot for the receipt, weighing and loading of less than carload freight.

Elliott on Railroads, Vol. 4, Secs. 1479, 1551, 1551-A, 1552.

Hutchinson on Carriers, Vol. 2, Sec. 509-10.

Moore on Carriers, Vol. 2, 797, et seq.

Fuller on Interstate Commerce, p. 110 et seq.

Beale & Wyman, Rate Regulation, Sec. Ed. Sec. 923.

Wyman on Public Service Corporations, Vol. 1, 818, and cases cited.

4 R. C. L., Sec. 431 et seq.

Covington Stockyards Co. v. Heath, 139 U. S. 128, 11 Sup. Ct. Rep. 461.

Ky. & Indiana Bridge Co. v. L. & N. Ry. Co., 37 Fed. 567, 610; 2 L. R. A. 289.

Butchers & Drovers Stockyards Co. v. L. & N. Ry. Co., 67 Fed. 35; 31 U. S. App. 252; 14 C. C. A. 290.

Central Stockyards Co. v. L. & N. Ry. Co., 118 Fed. 113, 63 L. R. A. 213, 55 C. C. A. 63, 192 U. S. 568, 48 L. Ed. 568, 24 Sup. Ct. Rep. 339.

45 L. & N. Ry. Co. v. Cent. Stockyards Co., 30 Ky. L. Rep. 18; 97 S. W. Rep. 778, 212 U. S. 132; 29 Sup. Ct. Rep. 246.

Under chapter 267 of the session laws of this state for the year 1909, and chapter 263 of the session laws of this state for the year 1915, it is the duty of the railway companies to install stockyards at stations in this state, and under the provisions of section 270 of the session laws of 1915, this board is given supervision over the inspection and testing of scales installed at stockyards for the weighing of live stock. We agree in every particular with the decisions of those courts and commissions which hold that stockyards are a necessary facility at stations where live stock is loaded and unloaded, and that freight warehouses and scales for the weighing of less than carload freight are necessary facilities at every station where freight is received, loaded and unloaded, and the same argument which may be used as a reason for refusing to install live stock scales at stockyards may likewise be urged against providing freight and passenger depots and stockyards. The majority of the people in this state, or at least those who are familiar with the handling of live stock at stockyards, know that live stock scales are not only a necessary

46 facility for the settlement between buyers and sellers, but also for the accommodation and use of shippers of all classes, those who are buyers and those who are individual shippers handling their own live stock for the purpose of ascertaining the correct weight of live stock loaded into cars to be shipped from that station, as well as live stock received into the yards from cars there unloaded. Entertaining these views, based on our experience and actual knowledge of the situation in this state, we must therefore respectfully decline to subscribe to the doctrine that scales are not necessary facilities at stockyards in this state.

Where scales are furnished at stockyards, all live stock loaded or unloaded at that station may be accurately weighed into or out of the cars, and the shipper will then know the actual weights of live stock shipped from or received at that yard. Under the statute enacted by the legislature at its last session, this board has provided a method whereby stockyard scales, and other scales of a similar kind, are tested and inspected by a competent scale man experienced in

the construction of scales and equipped to make thorough inspections and tests. The question of proper weights is a very important matter to shippers and carriers alike. The carriers base their freight charges on track scale weights. At times these weights are obtained by weighing the car while it is in motion or coupled into a train at one or both ends, and at still other times, the track scale being
 47 too short, the weights are obtained by weighing first one end and then the other end of the car. It is obvious that results thus obtained are very inaccurate, and generally it may be said that track scales are, as a rule, inaccurate and are tested and inspected only at rare intervals.

The Interstate Commerce Commission, in its general investigation "In re weighing of freight by carriers," 28 I. C. C. at page 11, in discussing the inaccuracy in the weights obtained by carriers, quotes from the report of the track scale inspector of the state of Oregon, as follows:

"In the forty scales that I have inspected, I have found only one that I could pass without adjustment. This was a privately owned scale which did not belong to any railroad. The scales inspected have varied from forty to twelve hundred pounds from correct weight. Some have weighed heavy and others have weighed light.

"Not a single scale in the lot was, in my judgment, originally properly installed. I found the main platform gearings out of place, and many scales have been found to be binding. There were all kinds of false bearings. Levers were out of level and connections not
 48 plumb, check rods too tight—in fact, I found about every possible defect that would cause a scale to give the wrong weight."

We remember this investigation by the Interstate Commerce Commission very distinctly, as we attended two of the hearings, one at Chicago and another at St. Paul. The testimony in that record was a sad commentary on the carriers' method of weighing carload freight. The report of the Interstate Commerce Commission covers pages 1 to 37 of the volume above cited, and while it does not discuss the testimony at length, it discloses a somewhat startling situation, not only in the inaccuracy of track scale weights, but in the under and over stenciling of the capacity of cars.

Again, it frequently occurs that between point of loading and destination entire carloads of live stock are destroyed, and while it is true that the limited liability live stock shipping contract may fix the maximum liability of the carrier, this maximum liability is very materially affected by the actual weight of the shipment, and in such an instance the weights of the shipment taken on the stockyard scale at the point where loaded would afford a very desirable protection to the shipper and carrier alike. If the carriers are not to furnish
 49 scales for the weighing of live stock at their stockyards, by whom will these facilities be furnished? At most points where live stock are shipped, there are several buyers, and in addition individuals who at times sell to buyers and at other times ship their own stock. Must each individual shipper and each firm en-

gaged in buying and shipping live stock at a particular station furnish his or their own stockyards scale?

After a very careful examination of the evidence in this record, this commission is of the opinion and finds that live stock scales are a necessary facility at stockyards for the weighing of live stock received for the purposes of shipment, not only for the convenience of the public at large, live stock buyers and individual shippers, but in the necessary weighing preliminary to properly loading and subsequent to the unloading of live stock at such stockyards, and that there is an actual public necessity for the installation of a stockyards scale at the stockyards of the defendant at its station at Albee, in Grant County, in this state.

After a careful examination of the files of this commission, copies of which were made part of the record in this case, this commission is of the opinion and finds that for the purpose at Albee a four-ton stockyards scale of the make manufactured by the Fairbanks-Morse Company will be sufficient.

50 As conclusions from the foregoing findings, this board now hereby finds and decides:

1. That an order be made and entered in this proceeding requiring and commanding the Great Northern Railway Company to install not later than April 15, 1916, at its stockyards in Albee, a four-ton Fairbanks-Morse scale, in such manner as to permit of the use thereof in receiving stock into the stockyards and of weighing live stock prior to loading the same upon the cars, as well as in the weighing of live stock from the cars at that station.

Let an order be entered accordingly.

Order.

In this cause the board having completed its investigation and on this date made and filed its report containing its findings of fact and conclusions of law, and being fully advised in the premises, and sufficient cause for this order appearing:

It is therefore ordered, considered and adjudged: That the Great Northern Railway Company construct and put into operation
51 at its stockyards at its station at Albee, in Grant County, in this state, not later than April 15, 1916, a four-ton Fairbanks-Morse stockyards scale in such a manner as to permit of the weighing of live stock loaded into and unloaded from cars at that station, as well as the weighing of stock received into the stockyards at Albee.

By order of the board:

H. A. USTRUD, *Secretary.*

On the 24th day of January, 1916, certified copies of the said report, findings of fact, conclusions and order of the board of railroad commissioners were duly served upon the attorneys for the defendant railway company.

On the 12th day of February, 1916, the defendant appealed from the said final order or determination of the Board of Railroad Commissioners, to the circuit court of the second judicial circuit of the

State of South Dakota, within and for Minnehaha County, by serving upon the complainants, the Attorney General, and the secretary of the board of railroad commissioners, and by filing in the office of the secretary of said board, its notice of appeal, and thereupon perfected said appeal by filing its undertaking in the office of the secretary of the board of railroad commissioners as provided by

52 law.

On the 21st day of February, 1916, the secretary of the board of railroad commissioners, pursuant to the provisions of Chapter 312 of the Session Laws of 1913, duly made up and certified and transmitted to the clerk of the circuit court within and for Minnehaha County, the final record or judgment roll in said cause before the board of railroad commissioners.

Hearing in Circuit Court.

On the 20th day of April, 1916, said cause came on regularly for hearing and trial before the Honorable Joseph W. Jones, Judge of the circuit court of the second judicial circuit of the State of South Dakota, within and for Minnehaha County, at the court room in the court house in the city of Sioux Falls, South Dakota, and the said cause was thereupon heard and tried before the court upon the record made before the board of railroad commissioners, certified to the said court as aforesaid, no other evidence having been admitted or received, and upon briefs submitted by counsel the said cause was thereupon submitted to the said court for its decision and judgment.

As of the 6th day of July, 1916, the court made and ordered filed and entered its decision in the said cause dated January 27, 1917, consisting of Findings of Fact and Conclusions of Law as follows:

53

Findings of Fact and Conclusions of Law.

The above entitled matter having come regularly on for hearing before the court at Sioux Falls, in the second judicial circuit of the state of South Dakota, within and for the county of Minnehaha, on April 20, 1916, complainants appearing by their attorney, Oliver E. Sweet, and defendant appearing by its attorneys, Aikens & Judge, and the matter having been submitted to the court upon the record and briefs of respective counsel, and the court being fully advised in the premises, now makes and orders filed the following.

Findings of Fact.

I.

That the amount of live stock transported by the defendant railway company from its station at Albee, South Dakota, is very limited; that for a period of three years from May, 1912, to April, 1915, both inclusive, there were shipped over the defendants' line of road from said station at Albee only fifty-six cars of live stock, all of which

were shipped to a point or points outside the state of South Dakota; that during said period of time there were no carload shipments whatever of live stock from said station to any point or points in the state of South Dakota, and but two less than carload shipments, they being of single animals shipped to Bancroft, South Dakota, and that there is no public necessity for the establishment by the defendant railway company of a scale or scales for the weighing of live stock at its stockyards at Albee, South Dakota.

II.

That a scale at its stock yards at Albee, South Dakota, is not a facility necessary for the safety, convenience and accommodation of the public.

III.

That a stock yards scale such as complainants in this matter seek to have installed by defendant is not an instrumentality of shipment or carriage and is not included within the term "transportation" as defined by section 1 of Chapter 207 of the Session Laws of the State of South Dakota, of the year 1911, and is not a facility for receiving, forwarding and delivering by a common carrier of property to and from its lines and to and from other lines and places connected therewith; that such scales are commonly used for the sole purpose of facilitating the consummation of business transactions between buyers and sellers of live stock on the basis of weight, and that such scale is not used and would not be used at defendant's said station of Albee for the purpose of ascertaining the weight of live stock transported or to be transported for the purpose of ascertaining or computing the freight charges for the transportation of said live stock, or for any purpose connected with the transportation by defendant of property.

IV.

That shipments of live stock from said station of Albee are made and the freight charges therefor are computed upon a basis not requiring the use of a stock yard scale at said station; that live stock transported by defendant from said station is loaded into a car or cars, subject to tariff minimum weights, and when said car or cars arrived at the terminal stock market, their destination, the live stock so transported is there weighed upon track scales, and the weight so ascertained is the basis upon which freight charges are computed.

From the foregoing findings of fact, the court makes and orders filed the following.

Conclusions of Law.

I.

That the enforcement of the order appealed from or of an order such as complainants seek to have entered in this proceeding
56 would be in violation of the provisions of sections 2 and 13 of Article 6 of the Constitution of the State of South Dakota, and of Articles 5 and 14 of the Amendments of the Constitution of the United States of America, would be an unreasonable and unwarranted taking of defendant's property without due process of law, and without compensation, and would be denying to defendant the equal protection of the law.

II.

That the enforcement of the order appealed from or of an order such as complainants seek to have entered in this proceeding would necessitate the arbitrary and unreasonable taking of defendant's property, and that said order would not be justified by public necessities which defendant could lawfully be compelled to meet.

III.

That the order appealed from in this matter, to-wit: that certain order of the board of railroad commissioners of the State of South Dakota, made and filed in the above entitled matter on January 20th 1916, ordering and directing defendant to construct and put into operation at its stock yards at Albee, in Grant County, in this state, not later than April 15th, 1916, a four-ton
57 Fairbanks-Morse Stock Yards Scale in such manner as to permit of the weighing of live stock loaded into and unloaded from cars at that station as well as the weighing of stock received into the stock yards at Albee, should be reversed.

Let judgment be entered accordingly, and let the foregoing findings of fact and conclusions of law be filed in the office of this court nunc pro tunc as of the 6th day of July, 1916.

On the 6th day of July, 1916, the said circuit court rendered and the clerk of said court filed, attested and entered its judgment in said cause reversing the final order made by the board of railroad commissioners therein, which judgment is as follows:

Judgment.

The above entitled matter having come regularly on for hearing before the court at Sioux Falls, in the second judicial circuit of the state of South Dakota, within and for the county of Minnehaha, on April 20th, 1916, complainants appearing by their attorney, Oliver E. Sweet and defendant appearing by its attorneys, Aikens & Judge, and the matter having been submitted to the court upon the record

and briefs of respective counsel, and the court being fully advised in the premises.

58 Now therefore, on motion of Aikens & Judge, attorneys for defendant, it is ordered and adjudged, that the order appealed from in said matter, to-wit: that certain order of the Board of Railroad Commissioners of the state of South Dakota, made and filed in the above entitled matter on January 20th, 1916, ordering and directing defendant to construct and put into operation at its stock yards at its station at Albee, in Grant County, in this state, not later than April 15th, 1916, a four-ton Fairbanks-Morse Stock Yards Scale in such manner as to permit of the weighing of live stock loaded into and unloaded *into* cars at that station as well as the weighing of stock received into the stockyards at Albee, be and the same is hereby reversed.

By the court:

JOSEPH W. JONES, *Judge.*

Attest:

[SEAL.] E. J. ANDERSON, *Clerk,*

By OSCAR HAND, *Deputy.*

To the making and entry of the foregoing order, complainants duly excepted, which exception is allowed.

JOSEPH W. JONES, *Judge.*

On the 8th day of July, 1916, notice of rendering and entering the said decision and judgment was duly served upon the complainants, the Board of Railroad Commissioners and their attorney.
59

On August 1, 1916, the complainants and the board of railroad commissioners served upon the attorneys for the defendant and thereafter filed in said circuit court, a notice of intention to move for a new trial as follows:

Notice of Intention to Move for a New Trial.

To the Great Northern Railway Company, defendant, and to Messrs. Aikens & Judge, its attorneys:

Please take notice, That the complainants in the above entitled action and the Board of Railroad Commissioners of the State of South Dakota, intend to move the Circuit Court of the Second Judicial Circuit of the State of South Dakota, within and for the county of Minnehaha, and the Honorable Joseph W. Jones, the judge thereof, for an order to vacate and set aside the judgment rendered and entered in said court in the said county on the 6th day of July, 1916, wherein and whereby the said circuit court reversed that certain order made by the Board of Railroad Commissioners of the State of South Dakota on the 20th day of January, 1916, ordering and directing the defendant to construct and put into operation at its stock yards, at its station at Albee, in Grant County, South Da-

60 kota, not later than April 15, 1916, a four-ton Fairbanks-Morse stock yards scale, in such a manner as to permit of the weighing of live stock loaded into and unloaded from cars at that station, as well as the weighing of stock received into the said stock yards at Albee, and from the whole of such judgment, and for a new trial of said action, upon the grounds and for the following causes materially affecting the substantial rights of the claimants, to-wit:

1. Insufficiency of the evidence to justify the decision of the court.
2. That the judgment or decision of the court in the said cause is against law.

3. Error in law occurring at the trial and excepted to by the claimants.

The said motion will be made and based upon the judgment roll and upon the settled record in the said cause, together with the specifications of error thereto attached and made a part thereof.

Yours, etc.,

OLIVER E. SWEET,

Attorney for Complainants and for the Board of Railroad Commissioners of the State of South Dakota.

Attached to and as a part of the settled record are specifications of error, the said specifications of error are identical with the assignments of error printed herein, and each specification contained therein bears the same number as the corresponding assignment of error, except the assignment of error to the effect that the court erred in denying the motion of the complainant and board of railroad commissioners for a new trial, which assignment was not included in the specifications of error, and reference is hereby made to the said assignments of error for the sake of brevity and to avoid repetition.

Certificate Settling Record.

The foregoing record of proceedings before the board of railroad commissioners and before the said court was by the Judge of said court within the time limited by law, and on due notice duly settled and certified as the final settled record in said cause, in the manner provided by law.

Motion for a New Trial.

On the 10th day of February, 1917, and within the time limited by law, complainants and Board of Railroad Commissioners duly moved the court to vacate and set aside the decision and judgment rendered and entered in this cause, and to grant a new trial upon the same grounds and for the same causes as are particularly set out and specified in the assignments of error printed herein.

62

Order Overruling Motion for a New Trial.

Thereafter and prior to the perfecting of an appeal herein the court duly made and entered its order overruling and denying the

motion of the complainants and the board of railroad commissioners for a new trial, which said order was duly attested, filed and entered herein, and the complainants and board of railroad commissioners duly excepted to the making and entering of said order, and at their request the exception was duly signed and allowed by the court.

Appeal Perfected.

Thereafter and within the time limited by law therefor, the State of South Dakota on the relation of the Board of Railroad Commissioners duly perfected its appeal to the supreme court of the state of South Dakota, from the said decision and judgment of the court, and from the whole and each and every part thereof, and from said order overruling and denying the said motion for a new trial and from the whole and every part of said order, by serving and filing its notice of appeal in the manner provided by law.

Assignments of Error.

63 The State of South Dakota, on relation of the Board of Railroad Commissioners alleges that there is manifest error on the face of the record affecting the substantial rights of the complainants and of the appellant herein in this:

I.

The court erred in finding in its first purported finding of fact "that there is no public necessity for the establishment by the defendant railway company of scale or scales for the weighing of live stock at its stockyards at Albee, South Dakota," upon the ground and for the reason that the said finding is contrary to and not supported by the evidence in the record in this cause.

II.

The court erred in finding in its second finding of fact, "that a scale at the stockyards at Albee, South Dakota, is not a facility necessary for the safety, convenience and accommodation of the public," for the reason that the said finding is contrary to and not supported by the evidence in the record in this proceeding and for the further reason that the said finding is a conclusion of law and not a finding of fact.

III.

64 The court erred in finding in its third finding of fact that a stockyard scale such as the complainants seek to have installed at Albee "is not an instrumentality of shipment or carriage and is not included within the term transportation as defined by Section 1 of Chapter 207 of the Session Laws of the State of South Dakota, for the year 1911, and is not a facility for receiving, for-

warding and delivering by a common carrier of property to and from its lines and to and from other lines and places connected therewith," for the reason that the said finding is a conclusion of law and not a finding of fact and that the same is contrary to and not supported by the evidence in this proceeding.

IV.

The court erred in further finding as its third finding of fact, "that such scales are commonly used for the sole purpose of facilitating the consummation of business transactions between buyers and sellers of live stock on the basis of weight, and that such a scale is not used and would not be used at defendant's said station at Albee, for the purpose of ascertaining the weight of live stock transported or to be transported for the purpose of ascertaining or computing the freight charges for the transportation of said live stock or for any purpose connected with the transportation by defendant of property," upon the ground and for the reason that the said

65 finding is contrary to and not supported by the evidence in this proceeding and for the further reason that the court should have found that stockyard scales as installed by the defendant railway company at the station of Albee, South Dakota, would have been used by shippers of live stock at that station for their need, accommodation and convenience in a matter directly relating to the transportation of live stock from the said station over lines of the defendant railway in this particular: that such shippers would use such scales in determining the weight of live stock loaded in cars furnished by the defendant carrier for loading to determine whether or not such cars would be overloaded or underloaded or whether the weights of live stock loaded into the said cars would be less than or would exceed the established minimum weights for car loading in the defendant's different standard length live stock cars.

V.

That the court erred generally in entering findings of fact herein in favor of the defendant and against the complainants for all of the grounds and reasons hereinbefore stated.

VI.

66 The court erred in concluding as a matter of law that the order made by the board of railroad commissioners referred to in the court's first conclusions was in violation of the provisions of the constitution of the state of South Dakota, or the provisions of the constitution of the United States or any of the amendments thereof, and erred in concluding that the said order was an unreasonable and unwarranted taking of the defendant's property without due process of law, without compensation and that it would deny the defendant the equal protection of the law, for the reason that the said conclusion is contrary to law and is not supported by

any evidence in the record in this case nor by the court's findings of fact herein, and for the further reason that the order made by the board of railroad commissioners requiring the installation of stock scales at the stockyards adjacent to the line of railway of the defendant at Albee was an exercise of the powers of regulation reserved to the sovereign state of South Dakota, and was a police regulation under the police powers of the state of South Dakota, with reference to a business and a carrier within the jurisdiction of the board of railroad commissioners, subject to the laws of this state relating to common carriers, involving a matter effected with a public interest and that the said order was not a taking of property in the sense prohibited in the Constitution of the United States or the Constitution of the State of South Dakota.

67

VII.

That the court erred in concluding as a matter of law in its second conclusion of law in holding that the order made by the board of railroad commissioners in this case would necessitate the arbitrary and unreasonable taking of defendant's property and that said order was not justified by public necessities for the reason that the said conclusion is against law and further for all of the reasons stated in the preceding paragraph herein.

VIII.

For all the reasons heretofore specified and assigned the court erred in its third conclusion of law in holding that the order made and entered by the board of railroad commissioners in this proceeding on the 20th day of January, 1916, should be reversed upon the ground and for the reason that the said conclusion is against law, is not supported by the evidence of record in this proceeding by the court's findings of fact and for all of the further reasons heretofore stated and specified herein.

IX.

The court erred in entering decision and judgment in this cause in favor of the defendant and against the complainants reversing the order made by the board of railroad commissioners in this proceedings, and for all of the reasons heretofore specified and assigned and for the further reason that the said decision and judgment should have been in favor of the complainants and against the defendant, should have affirmed *by* the order made by the *the* board of railroad commissioners in this proceeding on January 20, 1916, wherein the defendant was required to construct and to put into operation at its stockyards at its station at Albee, in Grant County, South Dakota, not later than April 15, 1916, a four ton Fairbanks-Morse stockyards scale, in such manner as to permit of the weighing of live stock loaded into and unloaded from cars at that station as well as the weighing of stock received into the

68

stockyards at Albee; and for the further reason that upon the entire record in this proceeding the court should have found and decided that public necessity, accommodation, and convenience required the installation of stock scales at the stockyards adjacent to the defendant's railway at Albee, and that the board of rail-road commissioners proceeded regularly and lawfully in this proceeding and that they had jurisdiction to make the said order dated January 20, 1916, and that the said order was and is in all things just and reasonable.

X.

For all the reasons and errors aforesaid the court erred in denying and overruling the motion of the complainants and the board of railroad commissioners for a new trial.

Wherefore, the appellant herein prays that the decision and judgment of the circuit court rendered and entered in this cause be in all things vacated and set aside and that the order of the board of railroad commissioners herein be affirmed.

OLIVER E. SWEET,
*Attorney for the State of South Dakota ex Rel.
Board of Railroad Commissioners of the
State of South Dakota, Appellant.*

Material Evidence Preserved.

The foregoing contains a full, fair and complete statement of all the proceedings had and taken in said cause, both before the board of railroad commissioners, and on appeal to the said circuit court, and contains all of the evidence taken or offered on the trial of said cause that is in anywise material to a determination of the questions raised on this appeal.

70

Additional Statement.

Believing that the statement of the contents of the settled record as contained in appellant's brief is imperfect, respondent presents and asks consideration of the following additions to the statement:

Insert after the first paragraph on page 10 of the appellant's statement, the following:

"Q. Are there any other buyers at this station besides your firm?"

"A. No sir."

"Q. Can you describe why the business is such that you require scales at the stockyards here?"

Strike out the following in the last three lines on page 11 of appellant's statement: "The only way I can arrive at values of the stock is by weighing them. That is value we allow the seller," and insert in lieu thereof the following:

"Q. The purpose for which you desire a stock scale installed is in order to enable you to adjust matters between you and persons from whom you purchase stock, is it not?

"A. That is the only way I can arrive at values is by weighing them.

"Q. That is the value which you allow the seller?

"A. Yes, sir."

71 Strike out the last eight words in the eighth line from the bottom of page 14 of appellant's statement and the last seven lines of said page, and the first seven lines of page 15 thereof, and insert in lieu thereof the following:

"Q. Do you know of any stations in this state along the line of the Great Northern road where they do have stock scales?

"Mr. Judge: We want to enter the objection that it is irrelevant.

"Mr. Murphy: Overruled. (Exception noted.)

"A. Yes, sir.

"Q. Have they stock scales at Nassau?

"A. Yes, sir, but that is in Minnesota.

"Q. Have you been at the stockyards at Watertown?

"A. No, sir.

"Q. Do you know what the practice is on other lines of railway in this state?

"A. Yes, sir, some.

"Q. Do you know this of your own actual knowledge?

"A. Yes, sir.

"Q. You have visited these stockyards and seen the scales?

"A. Yes, sir.

72 "Q. I will ask you to state whether or not the practice is uniformly on the part of the carriers to furnish stockyard scales at their stations in this state?

"Mr. Judge: This is objected to as irrelevant; further for the reason that the witness has not shown himself competent to testify and is calling for a conclusion and not a statement of facts.

"May the objection be noted to all that class of testimony as being irrelevant?

"Mr. Murphy: The objection is overruled, and the objection may stand as to that class of testimony.

"A. Yes, sir.

"— I will ask you to give the names of stations in this state on other lines of railway where the carriers or the railway company has provided scales for the weighing of stock at the stock yards?

"A. At Revillo, on the M. & St. L., and Milbank and Big Stone, on the C. M. & St. P. These are our competitive points. Also at Marietta, on the St. Louis."

73 Insert after the word "company" in the eleventh line from the bottom of page 15 of appellant's statement the following:

"Q. Go on and state in your own language why in your opinion stock scale is necessary or desirable at the stock yards at its station at Albee."

Insert after the word "yards" in the sixth line from the top of page 16 of appellant's statement the following:

"Q. Do you know whether or not the railway company has stock scales at any of its other stations in this state?"

"Mr. Judge: All that is objected to as irrelevant and we ask that the objection be continued as to that class of testimony."

Insert after the words "South Dakota" in the third line from the top of page 18 of appellant's statement the following: "Interrogated by Mr. Dougherty."

Strike out the disjunctive "or" in the sixth line from the bottom of page 22 of appellant's statement, and insert in lieu thereof a comma.

74

File No. 4186.

IN THE SUPREME COURT,
State of South Dakota, ss:

October Term, A. D. 1917.

Present: Chas. S. Whiting, Presiding Judge; Ellison G. Smith, J. H. McCoy, John Howard Gates, and Samuel C. Polley, Judges of said Court, and the officers thereof.

CAHILL and REDMAN, Complainants, and STATE ex Rel. BOARD OF RAILROAD COMMISSION, Plaintiff and Appellant,

vs.

GREAT NORTHERN RAILWAY COMPANY, a Corporation, Defendant and Respondent.

This action coming on to be heard at the April, A. D. 1917, Term of this Court at the Supreme Court Room, in the City of Pierre, State of South Dakota, upon the merits of the case and without oral argument, and the Court having advised thereon and filed its decision in writing,

It is considered, ordered and adjudged, that the findings and judgment of the Circuit Court, within and for Minnehaha County, appealed from herein, be and the same are hereby reversed and the order of the Railway Commissioners requiring the installation of any standard four ton stock yard scale at the town of Albee should be affirmed.

And it is further ordered, that this action be and it is hereby remanded to said Circuit Court for further proceedings according to law and the decision of this Court.

And it is further ordered and adjudged, that appellant have and recover of the respondent costs and disbursements on this appeal, expended, taxed and allowed at Sixty and 25/100 Dollars.

By the Court:

CHAS. S. WHITING,
Presiding Judge.

Attest:

[SEAL.] E. F. SWARTZ, *Clerk.*

By ———, *Deputy Clerk.*

[Endorsed:] (File No. 4186.) In Supreme Court, State of South Dakota, October Term, 1917. Cahill et al., Complainants; State ex rel. Board of R. R. Commissioners, Plaintiff and Appellant, vs. Great Northern Ry. Co., Defendant and Respondent. Supreme Court, State of South Dakota. Filed Feb. 5, 1918. E. F. Swartz, Clerk. Remittitur sent down Mar. 26, 1918. Recorded in Judgment Book 10, page 353.

75 4186—r—"S."

In the Supreme Court, State of South Dakota.

CAHILL and REDMAN, Complainants, and STATE ex Rel. BOARD OF
RAILROAD COMMISSIONERS, Appellant,

vs.

GREAT NORTHERN RAILWAY COMPANY, a Corporation, Defendant
and Respondent.

Appeal from Circuit Court of Minnehaha County—Hon. Joseph W.
Jones, Judge.

Opinion.

Filed Feb. 5, 1918.

76 Oliver E. Sweet, Assistant Attorney General, Pierre, for Ap-
pellant.
Aitkens & Judge, Sioux Falls, for Respondent.

SMITH, J.:

The Board of Railroad Commissioners made an order—

"that the Great Northern Railway Company construct and put in operation at its stockyards at its station at Albee, in Grant County, in this state, not later than April 15, 1916, a four ton Fairbanks-Morse stockyards scale in such manner as to permit of the weighing of local stock loaded into and unloaded from cars at that station, as well as the weighing of stock received into the stockyards at Albee."

The Great Northern Railroad appealed from this order to the Circuit Court of Minnehaha County, and that court, upon review of the evidence and proceedings before the Board of Railroad Commissioners, found as matter of fact that a scale at the stockyards at Albee was not a facility necessary for the convenience and accommodation of the public; that shipments of local stock from said station are made and freight charges thereon computed upon a basis not requiring the use of stockyard scales at said station; that livestock so shipped and loaded into cars is subject to tariff minimum weights, and is weighed upon track scales at the terminal market, and that the weight so ascertained is the basis upon which freight charges are computed; that stockyard scales at the town of Albee is not an instrumentality of shipment or carriage, and is not included in "transportation," and is not a facility for receiving, forwarding or delivering property by the common carrier to and from its lines or other lines and places connected therewith; that such scales would be useful and would be used only for the purpose of facilitating the consummation of business transactions between buyers and sellers of local stock and would not be used at the station of Albee as the basis of weight for ascertaining or computing freight charges for

77 transportation or for any purpose connected with transportation of such property by the defendant; that carload lots of stock are always shipped subject to traffic minimum carload rates, and that weighing at terminal or other points enroute, is for the purpose only of ascertaining the excess of the load over minimum weight, upon which excess freight charges are computed to be added to the minimum carload rate. The following facts although not included in the express findings of the Board of Railroad Commissioners, or in the findings of the trial court, are shown by undisputed evidence in the record, viz: From May 1912 to April 1915 inclusive, only fifty-six carloads of stock were shipped from the town of Albee to terminal points outside of the state, and during the same period not a single carload shipment was made to any point in South Dakota; also that in the same period only two shipments of single animals were made to a point in South Dakota.

As a conclusion of law the court found that the enforcement of the order would not be justified by public necessities which defendant could lawfully be compelled to meet, and would constitute an arbitrary and unreasonable taking of defendant's property. Thereupon judgment was entered reversing the order of the Board of Railroad Commissioners and the matter is before us upon appeal from the findings, conclusions and judgment of the circuit court.

Appellant relies upon two propositions: First, that local buyers and sellers of livestock have the right to demand the installation of stockyard scales for their own convenience in buying livestock, and second, that it is the duty of the carrier to furnish the shipper such facilities as will enable him to avoid underloading cars where the rate is fixed upon minimum loads, and to ascertain the cost of shipping stock in a car in excess of the minimum carload weight. The fallacy of the first proposition is so clear that discussion would

be idle. The carrier owes no duty to the local buyer or seller of live stock until the stock is tendered at the stockyards for shipment. *New Mexico Wool Growers Assn. v. Atchison T. & S. F. R. R. Co.*, 145 Pac. 1077; *McDonald v. P. C. C. & St. L. R. Co. Public Utilities Rep.* 1916 E. 801.

The evidence on behalf of appellant is substantially as follows: Mr. Cahill, one of the complainants, testified that his firm were the only buyers of livestock at Albee; that the stockyards scales were required for their convenience and for the convenience of the patrons of the railroad company; that when they bought stock and weighed it on different scales, the sellers were not satisfied; that they did not buy in carloads and that carload weights would not determine the amount of stock bought from any individual; that his firm bought by weight; that when buying stock, it was driven into the stockyards and each animal was taken to a scale belonging to a coal dealer, about 200 feet from the stockyards, where it was weighed; that the freight rates on stock shipments were determined by weighing on track scales at the terminal point—which is the uniform practice; that his firm ships practically all their stock to South St. Paul; that they had made no shipment of stock in carload lots to any point in South Dakota; that the only way they can arrive at values of stock is by weighing it—that is, the value allowed the seller; that sometimes they had two or three carloads of stock in the yards at one time; that stock cars were of different capacities and that it was necessary to weigh stock when loading it in order to determine the minimum load for each car; that the main thing is to guard against overloading and underloading; that they pay more attention to the condition of the cars as to overcrowding than as to weights.

79 Mr. Redman, his partner, testified that it would be more convenient for his firm and for the men they buy from to have a scale on account of weighing the stuff; that it would also be handy in the way of loading cars, as Mr. Cahill stated; that two or three times parties at Watertown would have bought hogs but they were unable to sell them on account of not having any way to weigh them. Mr. Street, a witness for the complainant, testified that the principal reason why there should be scales at the stockyards at Albee is in buying cattle; that he was a stockraiser and would rather sell stock to a buyer where there was a stockyards scale; that he preferred to sell by weight rather than on the hoof; that the scale facilitates business between the purchaser and the seller; that he ships his stock to South St. Paul. Wellatz, a witness on behalf of complainants testified, that he was a stockraiser and sold mostly to Redman and Cahill; that they ought to have a stockyards scale at Albee because they had so much bother with other scales when stock was weighed. Mr. Chambers, station agent at Albee testified that in 1912, eleven carloads of stock were shipped from Albee, in 1913, four carloads, in 1914, nineteen carloads, in 1915, from January to April, inclusive, nine carloads, a total of 56 carloads; that no carload shipments of stock during that time had been made to any point in South Dakota; that

a couple of single animals carried to Bancroft were the only intra shipments made in the same period.

The general rule as stated in 10 Corpus Juris, 59 (§44) is that:

"The legislature of a state has the power to require carries in the carrying on of their business as such, to accord every reasonable facility and convenience for the transaction of such business with the patronizing public, and this power may be delegated to a commission by the legislature. The carrier may in addition to the facilities and accommodations already furnished, be required to render a particular service that is essentially its duty to do, for the reasonable requirements of the public service undertaken, and the fact that such service would be unremunerative "and burdensome, does not operate to prevent the state from imposing the duty to perform it, if the burden to the carrier has some fair relation to the benefits accruing to the public, and the burden of the particular service considered with reference to the entire business of the carrier, does not in fact amount to a denial to the carrier of a reasonable compensation for the service rendered by it as an entirety. * * * The duty of a carrier of livestock it is said cannot be efficiently discharged without the aid of pens or yards in which the livestock offered for shipment can be received and handled with safety and without inconvenience to the public, before being loaded in the cars in which they are to be transported and such duty is strictly analogous to the duty of the carrier to construct and maintain a secure depot for inanimate freight." Id. 79 (§81).

The principle stated is applicable here. The furnishing of stockyard scales by the carrier, at the point of shipment of livestock by means of which the shipper may ascertain the minimum loading of cars as well as excess loading, so far pertains to the business of transportation itself, as to constitute such scales a reasonable facility for transacting its business with shippers at the initial point of shipment. The reasonableness of such requirement however, depends, in each instance, upon surrounding circumstances and conditions. The judgment appealed from appears to have been based largely upon the theory that stockyard scales are not an instrumentality of transportation of livestock, although the trial court found that such a scale "is not a facility necessary for the safety, convenience and accommodation of the public," at the town of Albee. The evidence is undisputed as to the amount of livestock shipped each year during the three years preceding the hearing, but we are not convinced that the installation of a four ton stock scale as ordered by the Board of Railway Commissioners is not actually and reasonably necessary for the proper convenience of shippers of live stock.

The general rule, where such administrative commissions have been created by law and vested with authority to investigate and determine conditions which justify the requirement of proper facilities for the transportation of commodities or passengers, is that a determination or decision upon matters of fact should not be disturbed by appellate courts, unless it clearly appears that such decision is unreasonable or arbitrary or is based upon an erroneous or mistaken theory of the law. Minneapolis, etc. Ry. Co. v.

Railroad Comm. (Wis.) 17 L. R. A. (N. S.) 821; People ex rel. v. Public Service Comm. et al., 160 N. Y. Supp. 63; Hocking Valley Ry. Co. v. Board of Public Ut. Comms. (Ohio) 110 N. E. 521; Public Service Ry. Co. v. Board of Public Ut. Comms. (N. J.) 93 at 585; State ex rel. v. Great Northern Ry. Co. (Minn.) 144 N. W. 155.

We are therefore of the view that the findings and judgment of the trial court should be reversed and the order of the Railway Commissioners requiring the installation of any standard four ton stockyard scale at the town of Albee should be affirmed. It will be so ordered and adjudged.

82 In the Supreme Court of the State of South Dakota, April Term, A. D. 1917.

J. C. CAHILL and GEORGE REDMAN, Copartners as Redman & Cahill, Complainants, and The State of South Dakota ex rel. P. W. Dougherty and J. J. Murphy and F. E. Wells, as and Constituting the Board of Railroad Commissioners of the State of South Dakota, Appellant,

VS.

GREAT NORTHERN RAILWAY COMPANY, a Corporation, Defendant and Respondent.

Application for Rehearing.

To the Honorable the Supreme Court of the State of South Dakota:

The defendant and respondent, Great Northern Railway Company, a corporation, hereby applies for a rehearing of the above entitled action under the eighteenth rule of this court, and begs leave to suggest the following reasons therefor:

1. That the order of the Board of Railroad Commissioners, the above named appellant, will, if enforced, amount to a confiscation of the property of defendant and respondent, and a deprivation of its property without due process of law contrary to Section 1 of the Fourteenth Amendment to the Federal Constitution.

2. That the order of the Board of Railroad Commissioners, the above named appellant, will, if enforced, deprive the defendant and respondent of its property without compensation and without

83 due process of law in violation of Section 1 of the Fourteenth Amendment to the Federal Constitution.

3 That the reversal by this court of the judgment of the circuit court of the second judicial circuit and the affirmance of the order of the Board of Railroad Commissioners herein and the enforcement of said order would deny to defendant and respondent its rights under Section 1 of the Fourteenth Amendment to the Federal Constitution.

4. That a reversal of the judgment of the circuit court of the second judicial circuit and the affirmance of the order of the Board of Rail-

road Commissioners would also be in violation of the provisions of Sections 2 and 13 of Article 6 of the Constitution of the state of South Dakota.

It was the intention of defendant and respondent to, and we believe that it did, present the foregoing propositions in the first instance in its answer to the complaint lodged by complainants with the Board of Railroad Commissioners (Appellant's Brief p. 8).

The Board of Railroad Commissioners in its findings and conclusions (Appellant's Brief p. 42) recognized the fact that such issues were presented to them.

The circuit court of Minnehaha County took cognizance of the issues above referred to and held with defendant and respondent (Conclusion of Law I., Appellant's Brief pp. 56-57).

In the brief of defendant and respondent (pp. 48-52), the above issues were attempted to be set forth and by quotations from the case of Great Northern Railway Company v. Minnesota Railroad and Warehouse Commission, 238 U. S. 340, clearly presented. This court, however, in its opinion (166 N. W. 307) refers to the above issues, if at all, only as follows:

"As a conclusion of law the court found that the enforcement of the order would not be justified by public necessities which defendant would lawfully be compelled to meet, and would constitute an arbitrary and unreasonable taking of defendant's property."

84 Nowhere in its opinion do we find that any further reference is made to the constitutional questions we have referred to. We conclude therefore, that the court has inadvertently overlooked our contention in that regard.

Respectfully submitted.

AIKENS & JUDGE,

Attorneys for Defendant and Respondent.

85 [Endorsed:] 4186. In the Supreme Court of the State of South Dakota. Cahill & Redman, Complainants, and State of South Dakota, ex rel. P. W. Dougherty, et al., Appellant, vs. Great Northern Railway Co., Respondent. Copy. Application for rehearing. Supreme Court, State of South Dakota. Filed Mar. 18, 1918. E. F. Swartz, clerk. Aikens & Judge, Attorneys at Law, Sioux Falls, S. D.

86 In the Supreme Court of the State of South Dakota, April Term, A. D. 1917.

J. C. CAHILL and GEORGE REDMAN, Copartners as Redman & Cahill, Complainants, and The State of South Dakota ex Rel. P. W. Dougherty and J. J. Murphy and F. E. Wells, as and Constituting the Board of Railroad Commissioners of the State of South Dakota, Appellant,

vs.

GREAT NORTHERN RAILWAY COMPANY, a Corporation, Defendant and Respondent.

Answer to Petition for Rehearing.

The appellant, the state of South Dakota, on relation of the board of railroad commissioners for its answer to the petition for re-hearing filed herein by the defendant and respondent, respectfully shows:

I.

That the petition for re-hearing does not present any new proposition of law or of fact, and does not suggest any view of the questions in this case which was not presented in the brief of the respondents or in the brief of the appellants filed herein; and the said petition does not present any question or fact which the court has not already fully considered and determined in reaching its decision
87 in this case; that this position of the answering appellants herein is correct is indicated by the following statement on page 2 of the petition:

"It was the intention of defendant and respondent to, and we believe that it did, present the foregoing propositions in the first instance in its answer to the complaint lodged by the complainants with the board of railroad commissioners. (Appellant's Brief, Page 8.)"

II.

As we understand the position of the defendant and respondent in this petition, it contends that the court overlooked the constitutional questions referred to in the petition and did not consider such contentions in making its decision in this case. In this we respectfully submit that the defendant and respondent is in error. The court did give consideration to the objections on constitutional grounds made by the defendant and respondent in its answer to the complaint and in its brief on this appeal, but clearly the court did not follow the reasoning of the Supreme Court of the United States in *Great Northern Railway Company vs. Minnesota Railroad and Warehouse Commission*, 248 U. S. 340, because the court distin-

guished the instant case from that case in this that, whereas, it appeared from the evidence in the Minnesota Case that stock yard scales were not shown to be a facility of transportation, nevertheless, in this case the evidence and the record clearly show that stock yard scales were a transportation necessity and facility. In other words, the court was clearly of the opinion that the present case is to be distinguished from the Minnesota Case because the record in this case shows the particulars in which stock yard scales are related to the business of transportation performed by the railroad companies, whereas, there was nothing in the record in the Minnesota case to connect the use of stock yard scales with any transportation service of the railroad company.

III.

Because the constitutional questions raised by the defendant and respondent are all based upon the premises that stock yard scales bear no relation to transportation service performed by railroads, therefore, these contentions of the defendant and respondent are not in point in a case in which there is no foundation for that premises. In this case because the court was satisfied that stock yard scales are necessary and proper facilities to enable a shipper "to avoid overloading cars where the rate is fixed upon minimum loads, and to ascertain the cost of shipping stock in a car in excess of the minimum carload weight," the contentions of the defendant and respondent that the order of the board was invalid on constitutional grounds is beside the point. For these reasons the court did not discuss the constitutional questions contended for by the defendant and respondent. Under the court's theory of the case, these contentions were not pertinent. We, therefore, submit that because the court has had before it and considered every point covered by the petition for re-hearing, that petition should be in all things denied.

Respectfully submitted.

OLIVER E. SWEET,

Attorney for the Board of Railroad Commissioners, Appellant.

89 [Endorsed:] 4186. Cahill et al. vs. Great Northern Ry. Co. Copy. Answer Petition for Rehearing. Supreme Court, State of South Dakota. Filed Mar. 19, 1918. E. F. Swartz, Clerk.

90 I, E. F. Swartz, Clerk of the Supreme Court of the State of South Dakota, do hereby certify that the following is a true copy of the entry made upon the minutes of this court at the proceedings had on the 26th day of March, 1918:
"4186, Cahill et al. v. Great Northern Ry. Co. Petition for rehearing denied."

And I further certify that no formal order in writing denying the petition for rehearing was made in the above entitled cause.

[Seal Supreme Court, State of South Dakota.]

E. F. SWARTZ,
Clerk of Supreme Court of the
State of South Dakota.

91 In the Supreme Court of the State of South Dakota, April Term, 1917.

J. C. CAHILL and GEORGE REDMAN, Copartners as Redman & Cahill, Complainants, and The State of South Dakota ex Rel. P. W. Dougherty and J. J. Murphy and F. E. Wells, as and Constituting the Board of Railroad Commissioners of the State of South Dakota, Appellant,

vs.

GREAT NORTHERN RAILWAY COMPANY, a Corporation, Defendant and Respondent.

Petition for Writ of Error.

To the Honorable Justices of the Supreme Court of the State of South Dakota:

Your petitioner, the above named Great Northern Railway Company, a corporation, respectfully shows that on the 5th day of February, A. D. 1918, the supreme court of the state of South Dakota rendered a final judgment against your petitioner in a certain case wherein your petitioner was defendant and respondent, and J. C. Cahill and George Redman, co-partners as Redman & Cahill, were complainants, and the State of South Dakota, ex rel. P. W. Dougherty and J. J. Murphy and F. E. Wells, as and constituting the Board of Railroad Commissioners of the State of South Dakota, was appellant, and subsequently and on the 26th day of March, 1918, the

92 said supreme court of the state of South Dakota denied the petition of the above named defendant and respondent for a rehearing as will appear by reference to the record and proceedings in said case, and that the said supreme court is the highest court of law or equity of said state of South Dakota, in which a decision in said suit could be had; that in the said suit and in said petition for a rehearing it was contended that the order of the Board of Railroad Commissioners of the State of South Dakota (which said order was reversed by a judgment of the circuit court of the said state of South Dakota within and for the county of Minnehaha, in the second judicial circuit and which judgment was reversed and the order of the Board of Railroad Commissioners affirmed by the judgment of the supreme court of the state of South Dakota) would confiscate and deprive defendant of its property without due process of law and contrary to Section 1 of the Fourteenth Amendment of the

Federal Constitution, and there was in consequence of such contention of your petitioner drawn in question therein and thereto to the application of said Section 1 of the Fourteenth Amendment of the Federal Constitution.

That the decision of this court is against the right claimed thereunder by the said Great Northern Railway Company, defendant and respondent, and as it believes is contrary thereto, all of which will more fully appear in detail from the assignments of error filed herein.

Wherefore, the said Great Northern Railway Company, a corporation, prays that a writ of error may issue to the supreme court of the state of South Dakota, for the correcting of the errors complained of and that a duly authenticated transcript of the record, proceedings and papers therein may be sent to the United States Supreme Court.

Dated April 12th, 1918.

GREAT NORTHERN RAILWAY
COMPANY,

By AIKENS & JUDGE,

Of Sioux Falls, S. D.;

E. C. LINDLEY,

Of St. Paul, Minnesota, and

M. L. COUNTRYMAN,

Of St. Paul, Minnesota,

Attorneys for Defendant and Respondent.

93 [Endorsed:] 4186. (1.) In the Supreme Court of the State of South Dakota, April Term, 1917. J. C. Cahill and George Redman, Copartners as Redman & Cahill, Complainants, and State of South Dakota, ex Rel. P. W. Dougherty et al., Appellant, vs. Great Northern Railway Co., Respondent. Petition for Writ of Error. Supreme Court, State of South Dakota. Filed Apr. 12, 1918. E. F. Swartz, clerk. Aikens & Judge, Attorneys at law, Sioux, Falls, S. D.

94 In the Supreme Court of the United States.

J. C. CAHILL and GEORGE REDMAN, Copartners as Redman & Cahill, Complainants, and The State of South Dakota ex Rel. P. W. Dougherty and J. J. Murphy and F. E. Wells, as and Constituting the Board of Railroad Commissioners of the State of South Dakota, Appellant,

vs.

GREAT NORTHERN RAILWAY COMPANY, a Corporation, Defendant and Respondent.

UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable the Justices of the Supreme Court of the State of South Dakota, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of South Dakota, before you, or some of you, being the highest

- court of law or equity of the said state, in which a decision could be had in the said suit between J. C. Cahill and George Redman, copartners as Redman & Cahill, complainants, and the State of South Dakota, ex rel. P. W. Dougherty, and J. J. Murphy and F. E. Wells, as and constituting the Board of Railroad Commissioners of the State of South Dakota, appellant, and Great Northern Railway Company, a corporation, defendant and respondent, wherein was drawn in question the validity of a statute of, or an authority exercised under the State of South Dakota, on the ground of their being repugnant to the Constitution of the United States, and the decision therein was in favor of their validity and against the right and privilege especially set up and claimed under such clause of the said Constitution,
- 95 a manifest error hath happened to the great damage of the said Great Northern Railway Company, a corporation, as by its complaint appears. We being willing that error, if any hath been shall be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty (30) days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, this 15th day of April, in the year of our Lord one thousand nine hundred and eighteen.

Done in the city of Sioux Falls, county of Minnehaha, state of South Dakota, with the seal of the District Court of the United States, for the district of South Dakota, attached.

[Seal U. S. Dist. Court, Dist. of South Dakota.]

OLIVER J. PENDAR,

*Clerk of the District Court of the United States
for the District of South Dakota.*

Allowed by

CHAS. S. WHITING,

*Presiding Justice of the Supreme Court
of the State of South Dakota.*

- 96 [Endorsed:] 4186. (4.) In the Supreme Court of the United States. J. C. Cahill and George Redman, Copartners as Redman & Cahill, Complainants, and The State of South Dakota, ex rel. P. W. Dougherty et al., Appellant, vs. Great Northern Railway Company, Respondent. Writ of error. Supreme Court, State of South Dakota. Filed Apr. 17, 1918. E. F. Swartz, clerk. Aikens & Judge, Attorneys at law, Sioux Falls, S. D.

97 In the Supreme Court of the State of South Dakota, April Term, 1917.

J. C. CAHILL and GEORGE REDMAN, Copartners as Redman & Cahill, Complainants, and The State of South Dakota ex Rel. P. W. Dougherty and J. J. Murphy and F. E. Wells, as and Constituting the Board of Railroad Commissioners of the State of South Dakota, Appellant,

vs.

GREAT NORTHERN RAILWAY COMPANY, a Corporation, Defendant and Respondent.

Comes now the Great Northern Railway Company, a corporation, the defendant and respondent above named, on this 12th day of April, 1918, and files and presents to this court its petition praying for the allowance of a writ of error intending to be urged by it; and praying further that a duly authenticated transcript of the records, proceedings and papers upon which the judgment herein was rendered, may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had in the premises as may be just and proper; and upon consideration of the said petition this court, desiring to give petitioner an opportunity to test in the Supreme Court of the United States the question herein presented, it is ordered by this court that a writ of error be allowed, as prayed, provided however, that the said Great Northern
98 Railway Company, give bond according to law in the sum of one thousand dollars (\$1,000.00), which said bond shall operate as a supersedeas bond.

In testimony whereof, witness my hand this 12th day of April, 1918.

CHAS. S. WHITING,
*Presiding Judge of the Supreme Court of the
State of South Dakota.*

Attest:

[Seal Supreme Court, State of South Dakota.]

E. F. SWARTZ, *Clerk.*

99 [Endorsed:] 4186. (3.) In the Supreme Court of the State of South Dakota, April Term, 1917. J. C. Cahill and George Redman, Copartners as Redman & Cahill, Complainants, and The State of South Dakota, ex rel. P. W. Dougherty et al., Appellant, vs. Great Northern Railway Co., Respondent. Order allowing writ of error. Supreme Court, State of South Dakota. Filed Apr. 12, 1918. E. F. Swartz, clerk. Aikens & Judge, attorneys at law, Sioux Falls, S. D.

100

Bond.

Know all men by these presents:

That we, *Great Northern Railway Company*, a corporation organized and existing under the laws of the state of Minnesota, as principal, and the *National Surety Company*, a corporation of the state of New York, as surety, are held and firmly bound unto J. C. Cahill and George Redman, co-partners as Redman & Cahill, and the State of South Dakota, in the sum of one thousand dollars (\$1000.00), to be paid to the said obligees for the payment of which well and truly to be paid we bind ourselves, our successors and assigns, jointly and severally, firmly by these presents.

Scaled with our seals and dated this 15th day of April, 1918.

Whereas, lately in the Supreme Court of the State of South Dakota, in a suit pending in said court between J. C. Cahill and George Redman, co-partners as Redman & Cahill, complainants, and The State of South Dakota, ex rel., P. W. Dougherty and J. J. Murphy and F. E. Wells, as and constituting the Board of Railroad Commissioners of the State of South Dakota, appellant, against Great Northern Railway Company, a corporation, defendant and respondent, a final judgment was entered against said defendant and respondent, and said defendant and respondent seeks to prosecute a writ of error in the Supreme Court of the United States to reverse the judgment rendered in said suit.

Now, therefore, the condition of this obligation is such, that if the above named defendant and respondent, Great Northern Railway Company, a corporation, shall prosecute its said writ of error to effect and answer all costs and damages, if it shall fail to make good its plea, then this obligation shall be void, otherwise to remain in full force and effect.

**GREAT NORTHERN RAILWAY
COMPANY.**

By E. C. LINDLEY, *Vice-President*.

Attest:

[Corporate Seal Great Northern Railway Company.]

L. E. KATZENBACH, *Secretary*.

[Seal National Surety Company New York, Incorporated 1897.]

NATIONAL SURETY COMPANY,
By L. A. GREEN,

Its Attorney in Fact.

G. E. JOHNSON,
M. FREDERICKSEN.

101 STATE OF MINNESOTA,

County of Ramsey, ss:

On this 15th day of April, 1918, before me, appeared E. C. Lindley, to me known, who, being by me duly sworn, did say that he is

the vice-president of the Great Northern Railway Company; that the seal affixed to the foregoing instrument is the corporate seal of said corporation, and that the said instrument was executed in behalf of said corporation by authority of its board of directors, and that said E. C. Lindley acknowledged said instrument to be the free act and deed of said corporation.

Witness my hand and notarial seal the day and year last above written.

[Notarial Seal, Ramsey County, Minn.]

JOHN W. ROSE,
Notary Public, Ramsey County, Minnesota.

My commission expires July 14, 1923.

STATE OF MINNESOTA,
County of Ramsey, ss:

On this 15th day of April, A. D. 1918, before me, appeared L. A. Green, to me personally known, who being by me duly sworn, did say that he is the attorney-in-fact of the National Surety Company, the corporation described in the foregoing instrument, and that the seal affixed to said instrument is the corporate seal of said corporation, and that the said instrument was signed and sealed in behalf of said corporation by authority of its board of directors, and said L. A. Green acknowledged said instrument to be the free act and deed of said corporation.

Witness my hand and official seal the day and year last above written.

[Notarial Seal, Ramsey Co., Minn.]

G. E. JOHNSON,
Notary Public, Ramsey County, Minnesota.

My commission expires Sept. 20, 1924.

The foregoing bond is approved as to form and sufficiency this 17th day of April, 1918.

CHAS. S. WHITING,
Presiding Judge.

102 [Endorsed:] 4186. (5.) In the Supreme Court of the State of South Dakota, April Term, 1917. J. C. Cahill and George Redman, Copartners as Redman & Cahill, Complainants, and The State of South Dakota, ex rel. P. W. Dougherty, et al., Appellant, vs. Great Northern Railway Co., Respondent. Bond. Supreme Court, State of South Dakota. Filed Apr. 17, 1918. E. F. Swartz, Clerk. Aikens & Judge, Attorneys at Law, Sioux Falls, S. D.

103 In the Supreme Court of the United States.

GREAT NORTHERN RAILWAY COMPANY, a Corporation, Plaintiff in Error,

VS.

J. C. CAHILL and GEORGE REDMAN, Copartners as Redman & Cahill (Complainants), and The State of South Dakota ex rel. P. W. Dougherty and J. J. Murphy and F. E. Wells, as and Constituting the Board of Railroad Commissioners of the State of South Dakota, Defendants in Error.

Assignments of Error.

Comes now Great Northern Railway Company, the plaintiff in error, in the above entitled cause, and avers and shows that in the record and proceedings in said cause the Supreme Court of the State of South Dakota erred to the grievous injury and wrong of the plaintiff in error herein and to the prejudice and against the rights of the plaintiff in error in the following particulars, to-wit:

1. That the said Supreme Court of the State of South Dakota erred in holding and deciding that the plaintiff in error should establish and install stock scales at the station of Albee, in Grant County, South Dakota, because of the duty of plaintiff in error to furnish a shipper such facilities as will enable him to avoid unloading cars where the rate is fixed upon minimum loads, and that the shipper may ascertain the cost of shipping stock in a car in excess of the minimum carload rate.

2. That the Supreme Court of the State of South Dakota erred in holding and deciding that the order of the Board of Railroad Commissioners of the State of South Dakota directing that plaintiff in error install stock scales at the station of Albee, Grant
104 County, South Dakota, for the weighing of livestock, was not a confiscation of the property of plaintiff in error and a deprivation of its property without due process of law, contrary to Section 1 of the Fourteenth Amendment of the Federal Constitution.

3. That the said Supreme Court of the State of South Dakota erred in refusing to hold and decide that the said order of the Board of Railroad Commissioners of the State of South Dakota, if enforced, would deprive plaintiff in error of its property without compensation and without due process of law, in violation of Section 1 of the Fourteenth Amendment of the Federal Constitution.

4. That the said Supreme Court of the State of South Dakota erred in not affirming the order of the trial court, which order reversed the said order of the Board of Railroad Commissioners of the State of South Dakota, upon the ground that said order of the Board of Railroad Commissioners, if enforced, would deny to plaintiff in error the equal protection of the laws, and would deprive it of its property

without due process of law, in violation of the Fourteenth Amendment of the Federal Constitution.

Wherefore, for these and other manifest errors appearing plaintiff in error prays that the judgment of the said the Supreme Court of the State of South Dakota be reversed and set aside and held for naught, and that judgment be rendered for plaintiff in error granting it its rights under the Constitution and statutes of the United States, and plaintiff in error also prays for judgment for its costs.

E. C. LINDLEY,

Of St. Paul, Minnesota;

M. L. COUNTRYMAN,

Of St. Paul, Minnesota,

F. R. AIKENS,

Of Sioux Falls, South Dakota, and

H. E. JUDGE,

Of Sioux Falls, South Dakota,

*Attorneys for Great Northern Railway
Company, Plaintiff in Error.*

Dated April 12th, 1918.

105 [Endorsed:] 4186. (2.) In the Supreme Court of the United States. Great Northern Railway Co., Plaintiff in Error, vs. J. C. Cahill and George Redman, Copartners as Redman & Cahill (Complainants), and The State of South Dakota, ex rel., Defendants in Error. Assignments of Error. Supreme Court, State of South Dakota. Filed Apr. 12, 1918. E. F. Swartz, Clerk. Aikens & Judge, Attorneys at Law, Sioux Falls, S. D.

106

Citation.

UNITED STATES OF AMERICA, ss:

The President of the United States to J. C. Cahill and George Redman, Copartners as Redman & Cahill, and the Board of Railroad Commissioners of the State of South Dakota, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the office of the clerk of the Supreme Court of the State of South Dakota, wherein the Great Northern Railway Company, is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable Chas. S. Whiting, Presiding Judge of the Supreme Court of the State of South Dakota, this 17th day of April, 1918.

CHAS. S. WHITING,
*Presiding Judge of the Supreme Court
of the State of South Dakota.*

Attest:

[Seal Supreme Court, State of South Dakota.]

E. F. SWARTZ, *Clerk.*

Due personal service of the above citation is admitted at Pierre, South Dakota, this 17th day of April, 1918.

OLIVER E. SWEET,
*Attorneys for Complainants and Board of
Railroad Commissioners, Defendants in Error.*

107 [Endorsed:] 4186. (6.) In the Supreme Court of the United States. Great Northern Railway Co., Plaintiff in Error, vs. Cahill & Redman and Board of Railroad Commissioners, et al., Defendants in Error. Citation. Supreme Court, State of South Dakota. Filed Apr. 17, 1918. E. F. Swartz, Clerk. Aikens & Judge, Attorneys at Law, Sioux Falls, S. D.

108 In the Supreme Court of the United States.

GREAT NORTHERN RAILWAY COMPANY, a Corporation, Plaintiff in Error,

vs.

J. C. CAHILL and GEORGE REDMAN, Copartners as Redman & Cahill (Complainants), and The State of South Dakota ex Rel. P. W. Dougherty and J. J. Murphy and F. E. Wells, as and Constituting the Board of Railroad Commissioners of the State of South Dakota, Defendants in Error.

Stipulation as to the Portions of the Record Which Shall Constitute the Transcript of the Record.

It is hereby stipulated and agreed by and between the attorneys for the respective parties to the above entitled action that the following portions of the record shall constitute the transcript of the record to be transmitted to the clerk of the Supreme Court of the United States by the clerk of the Supreme Court of the state of South Dakota, in obedience to the writ of error granted herein:

1. Complaint filed with the Board of Railroad Commissioners of the state of South Dakota, February 8th, A. D. 1915;
2. Call and demand by the Board of Railroad Commissioners dated February 8th, A. D. 1915;
3. Answer interposed by plaintiff in error;

4. What is said respecting "Notice of Hearing" appearing on pages 8 and 9 of the printed brief of appellant filed in the Supreme Court of South Dakota;

109 5. All that appears on pages 9 to 32, both inclusive, being that part which follows after the heading "Hearing before the Board," and ending with the fourth line on page 32 of the aforesaid printed brief of appellant;

6. That portion of the printed additional statement of respondent filed with the clerk of the Supreme Court of the state of South Dakota, being on pages 2 to 5, both inclusive, excepting from page 5 the last two lines thereof;

7. Findings and conclusions of the Board of Railroad Commissioners, appearing on pages 32 to 51, both inclusive, of the printed brief of appellant aforesaid;

8. Order of the Board of Railroad Commissioners appearing on pages 51-52 of the said printed brief of appellant;

9. All that appears on pages 52 to 70, both inclusive, of the said printed brief of appellant;

10. Judgment of the Supreme Court of the state of South Dakota, dated February 5th, 1918;

11. Opinion of the Supreme Court of the state of South Dakota, filed February 5th, 1918;

12. Appellant's petition for a rehearing in the Supreme Court of the state of South Dakota, filed on the 18th day of March, 1918;

13. Answer to the petition for rehearing filed on the 19th day of March, 1918;

14. Order or minutes of the court denying the petition for a rehearing;

15. Petition for writ of error to the Supreme Court of the United States;

16. Writ of error to the Supreme Court of the United States;

17. Order allowing writ of error to the Supreme Court of the United States;

110 18. Bond required by order allowing writ of error;

19. Assignments of error;

20. Citation, together with admission of service; and

21. In addition to the foregoing, the clerk of the Supreme Court of the state of South Dakota, shall make proper entry in his record of the filings by him of the various papers hereinbefore referred to, by endorsement thereof as upon the originals.

Dated April 29th, 1918.

E. C. LINDLEY,
FRANK R. AIKENS, AND
HAROLD E. JUDGE,
Attorneys for Plaintiff in Error.
OLIVER E. SWEET,
Attorney for Defendants in Error.

111 [Endorsed:] 4186. (7.) In the Supreme Court of the United States. Great Northern Railway Co., Plaintiff in

Error, vs. Redman & Cahill, Complainants, and The State of South Dakota ex rel. P. W. Dougherty et al., Defendants in Error. Stipulation as to the Portions of the Record Which Shall Constitute the Transcript of the Record. Supreme Court, State of South Dakota. Filed May 9, 1918. E. F. Swartz, Clerk. Aikens & Judge, Attorneys at Law, Sioux Falls, S. D.

112 In the Supreme Court of the State of South Dakota.

J. C. CAHILL and GEORGE REDMAN, Copartners as Redman & Cahill, Complainants, and The State of South Dakota ex Rel. P. W. Dougherty and J. J. Murphy and F. E. Wells, as and Constituting the Board of Railroad Commissioners of the State of South Dakota, Appellant,

vs.

GREAT NORTHERN RAILWAY COMPANY, a Corporation, Defendant and Respondent.

I, E. F. Swartz, Clerk of the Supreme Court of the State of South Dakota, do hereby certify that the foregoing pages numbered one (1) to ninety (90), both inclusive, constitute a true and correct copy of that portion of the record had and made in said Supreme Court, as specified in the stipulation of counsel hereto attached and made a part of this transcript, as said original record now remains upon the records and files of this office in the above entitled cause.

And I further certify that the foregoing and attached pages numbered ninety-one (91) to one hundred and eleven (111), both inclusive, are the original papers duly entered and filed in the said Supreme Court of the State of South Dakota in the above entitled cause upon the dates shown by the filing marks endorsed thereon.

All of which pages numbered one (1) to one hundred and eleven (111), both inclusive, constitute the record of the proceedings of this court in the said cause as the same is specified and set out particularly in the stipulation of counsel, as more fully appears upon pages 108 to 110 of this record.

In witness whereof I have hereunto set my hand and affixed the official seal of this court.

[Seal Supreme Court, State of South Dakota.]

E. F. SWARTZ.

Endorsed on cover: File No. 26,565. South Dakota Supreme Court. Term No. 481. Great Northern Railway Company, plaintiff in error, vs. J. C. Cahill and George Redman, copartners as Redman & Cahill, and The Board of Railroad Commissioners of the State of South Dakota. Filed June 1st, 1918. File No. 26,565.

Supreme Court of the United States.

OCTOBER TERM, 1918.

No. 481.

124

GREAT NORTHERN RAILWAY COMPANY, a corporation.

Plaintiff in Error.

vs.

J. C. CAHILL AND GEORGE REDMAN, copartners as REDMAN & CAHILL (Complainants), and The State of South Dakota ex rel, P. W. DOUGHERTY and J. J. MURPHY and F. E. WELLS, as and Constituting the Board of Railroad Commissioners of the State of South Dakota,

Defendants in Error.

In Error to the Supreme Court of the State of South Dakota.

BRIEF OF PLAINTIFF IN ERROR.

E. C. LINDLEY,

M. L. COUNTRYMAN,

St. Paul, Minn.,

F. R. AIKENS,

H. E. JUDGE,

Sioux Falls, S. D.,

Attorneys for Great Northern Railway Company, Plaintiff in Error.

Journal of the United States

Department of the Interior

Washington, D.C.

Volume 1, No. 1, January 1892

Published by the United States Government Printing Office

For sale by the Superintendent of Documents, Washington, D.C.

Subscription price, \$1.00 per annum in advance.

Single copies, 25 cents.

Entered as second-class matter, June 15, 1891.

Postage paid at Washington, D.C.

Acceptance for mailing at special rate of postage provided for in Act of October 3, 1917.

Postmaster: This publication is published by the United States Government Printing Office.

Copyright, 1892, by the United States Government.

Printed by the United States Government Printing Office.

Washington, D.C.

1892

1892

1892

1892

1892

1892

1892

1892

1892

1892

1892

1892

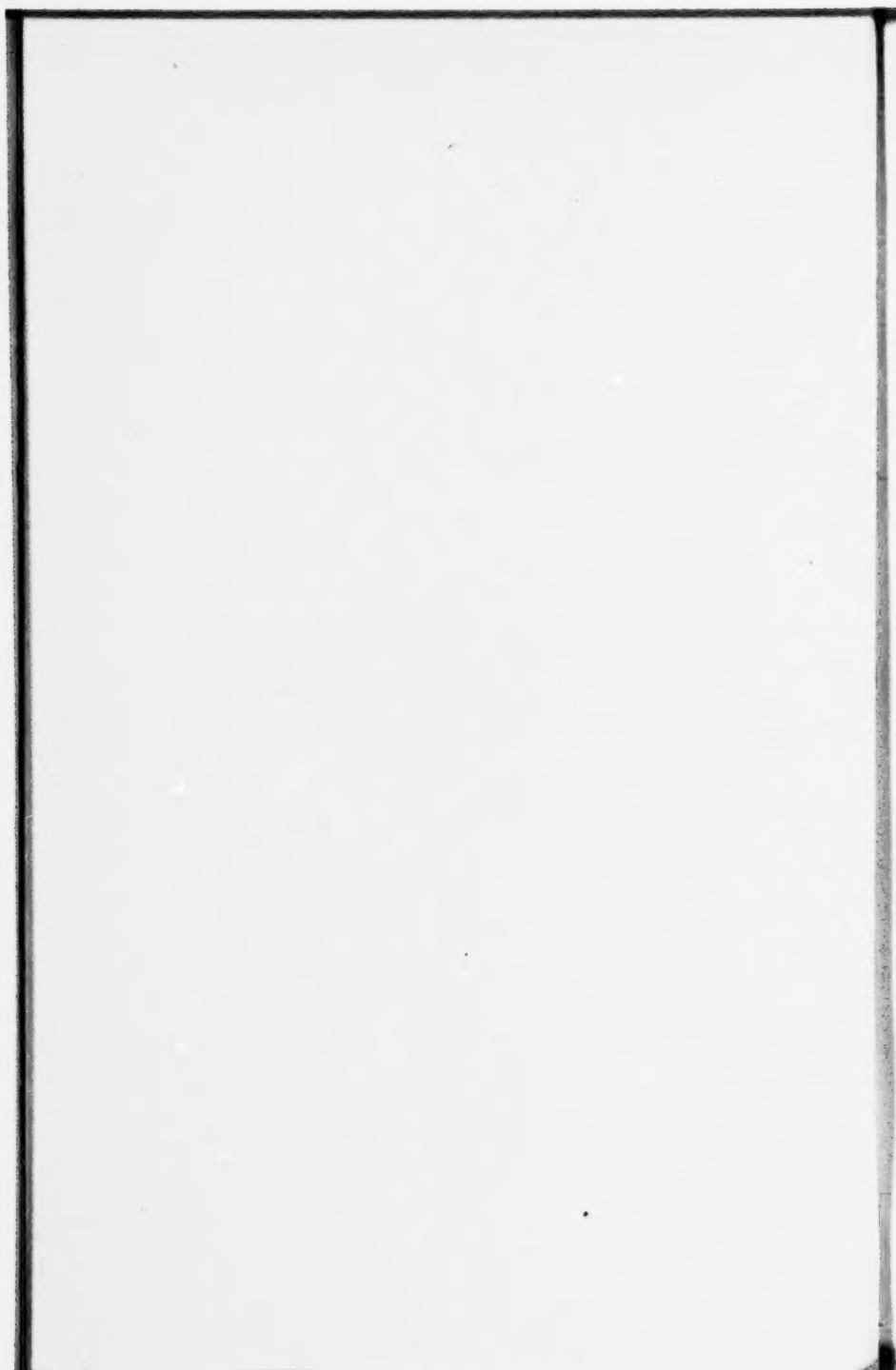
1892

SUBJECT INDEX.

	Page.
Statement of Facts	1
Assignments of Error	11
Argument	13

LIST OF CASES REFERRED TO.

Great Northern Railway Company v. Minnesota Railroad and Warehouse Commission, 238 U. S. 340...	13
Washington ex rel. Oregon R. & N. Co. v. Fairchild, 224 U. S. 510	18



Supreme Court of the United States.

OCTOBER TERM, 1918.

No. 481.

GREAT NORTHERN RAILWAY COMPANY, a corporation,
Plaintiff in Error,

vs.

J. C. CAHILL AND GEORGE REDMAN, copartners as REDMAN
& CAHILL (Complainants), and The State of South
Dakota ex rel, P. W. DOUGHERTY and J. J. MURPHY and
F. E. WELLS, as and Constituting the Board of Railroad
Commissioners of the State of South Dakota,
Defendants in Error.

*In Error to the Supreme Court of the State of South
Dakota.*

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF FACTS.

The Board of Railroad Commissioners of the State of South Dakota ordered the plaintiff in error, hereinafter referred to in this brief as the "Railway Company", to

construct and put into operation at its stockyards at Albee, South Dakota, a four-ton Fairbanks-Morse stockyards scale "in such a manner as to permit of the weighing of livestock loaded into and unloaded from cars at that station, *as well as the weighing of stock received into the stockyards at Albee.*" (Record p. 22, ff. 50-51.)

Upon appeal from this order to the Circuit Court of Minnehaha County, South Dakota, the court reversed it, deciding: that there was no public necessity for the scale; that it was not a facility necessary for the safety, convenience and accommodation of the public; that it was not an instrumentality of shipment or carriage and not included within the term "transportation" as defined by § 1 of Chapter 207 of the Session Laws of South Dakota, of the year 1911; that it would not be used at Albee for the purpose of ascertaining freight charges for the transportation of livestock, or for any purpose connected with transportation of property by the Railway Company; that freight charges upon livestock are based upon weights at destination, where the cars are weighed upon track scales; that the enforcement of the order appealed from would be in violation of Article 14 of the Amendments of the Constitution of the United States of America; would be an unreasonable and unwarranted taking of property without due process of law and without compensation; would deny to the Railway Company the equal protection of the law, and would necessitate the arbitrary and unreasonable taking of its property, and that said order was not justified by public necessities which the Railway Company could lawfully be compelled to meet. (Record pp. 23-25, ff. 53-56.)

From the judgment and order of the Circuit Court complainants and the Board of Railroad Commissioners of the State of South Dakota (Defendants in Error) appealed to the Supreme Court of the State of South Dakota. That court reversed the decision of the Circuit Court and affirmed the order of the Board of Railroad Commissioners requiring the installation of the scale. (Record p. 33, f. 74.)

In reversing the Findings and Judgment of the lower court, the Supreme Court says (Record pp. 35-38, ff. 77-81):

"Appellant relies upon two propositions: First, that local buyers and sellers of livestock have the right to demand the installation of stockyard scales for their own convenience in buying livestock, and **second, that it is the duty of the carrier to furnish the shipper such facilities as will enable him to avoid underloading cars where the rate is fixed upon minimum loads, and to ascertain the cost of shipping stock in a car in excess of the minimum carload weight.** The fallacy of the first proposition is so clear that discussion would be idle. The carrier owes no duty to the local buyer or seller of live stock until the stock is tendered at the stockyards for shipment. *New Mexico Wool Growers Assn. v. Atchison, T. & S. F. R. Co.*, 145 Pac. 1077; *McDonald v. P. C. C. St. L. R. Co.*, Public Utilities Rep. 1916 E. 801.

"The evidence on behalf of appellant is substantially as follows: Mr. Cahill, one of the complainants, testified that his firm were the only buyers of livestock at Albee; that the stockyards scales were required for their convenience and for the convenience of the patrons of the railroad company; that when they bought stock and weighed it on different scales, the sellers were not satisfied; that they did not buy in carloads and that carload weights would not determine the amount of stock bought from any individual; that his firm bought by weight; that when buying stock it was driven into the stockyards and each ani-

mal was taken to a scale belonging to a coal dealer, about 200 yards from the stockyards, where it was weighed; that the freight rates on stock shipments were determined by weighing on track scales at the terminal point—which is the uniform practice; that his firm ships practically all their stock to South St. Paul; that they had made no shipment of stock in carload lots to any point in South Dakota; that the only way they can arrive at values of stock is by weighing it—that is, the value allowed the seller; that sometimes they had two or three carloads of stock in the yards at one time; that stock cars were of different capacities and that it was necessary to weigh stock when loading it in order to determine the minimum load for each car; that the main thing is to guard against overloading and underloading; that they pay more attention to the conditions of the cars as to overcrowding than as to weights. Mr. Redman, his partner, testified that it would be more convenient for his firm and for the men they buy from to have a scale on account of weighing the stuff; that it would also be handy in the way of loading cars, as Mr. Cahill stated; that two or three times parties at Watertown would have bought hogs, but they were unable to sell them on account of not having any way to weigh them. Mr. Street, a witness for the complainant, testified that the principal reason why there should be scales at the stockyards at Albee is in buying cattle; that he was a stockraiser and would rather sell stock to a buyer where there was a stockyards scale; that he preferred to sell by weight rather than on the hoof; that the sale facilitates business between the purchaser and seller; that he ships his stock to South St. Paul. Wellatz, a witness on behalf of complainants, testified, that he was a stockraiser and sold mostly to Redman and Cahill; that they ought to have a stockyards scale at Albee because they had so much bother with other scales when stock was weighed. Mr. Chambers, station agent at Albee, testified that in 1912, eleven carloads of stock were shipped from Albee, in 1913 four carloads, in 1914 nineteen carloads, in 1915, from January to April, inclusive, nine carloads, a total of 56 carloads; that no carload shipments of

stock during that time had been made to any point in South Dakota; that a couple of single animals carried to Bancroft were the only intrastate shipments made in the same period.

"The general rule as stated in 10 Corpus Juris, 59 (§ 44) is that:

"The legislature of a state has the power to require carriers in the carrying on of their business as such, to accord every reasonable facility and convenience for the transaction of such business with the patronizing public, and this power may be delegated to a commission by the legislature. The carrier may in addition to the facilities and accommodations already furnished, be required to render a particular service that is essentially its duty to do, for the reasonable requirements of the public service undertaken, and the fact that such service would be unremunerative and burdensome, does not operate to prevent the state from imposing the duty to perform it, if the burden to the carrier has some fair relation to the benefits accruing to the public, and the burden of the particular service considered with reference to the entire business of the carrier, does not in fact amount to a denial to the carrier of a reasonable compensation for the service rendered by it as an entirety.

* * * The duty of a carrier of livestock it is said cannot be efficiently discharged without the aid of pens or yards in which the livestock offered for shipment can be received and handled with safety and without inconvenience to the public, before being loaded in the cars in which they are to be transported and such duty is strictly analogous to the duty of the carrier to construct and maintain a secure depot for inanimate freight.' Id. 79 (§ 81).

"The principle stated is applicable here. The furnishing of stockyard scales by the carrier, at the point of shipment of livestock by means of which the shipper may ascertain the minimum loading of cars as well as excess loading, so far pertains to the business of transportation itself, as to constitute such scales a reasonable facility for transacting its business with shippers at the initial point of shipment. The reasonableness of such requirement, however, depends,

in each instance, upon surrounding circumstances and conditions. The judgment appealed from appears to have been based largely upon the theory that stockyard scales are not an instrumentality of transportation of livestock, although the trial court found that such a scale is not a facility necessary for the safety, convenience and accommodation of the public, at the town of Albee. The evidence is undisputed as to the amount of livestock shipped each year during the three years preceding the hearing, but we are not convinced that the installation of a four-ton stock scale as ordered by the Board of Railroad Commissioners is not actually and reasonably necessary for the proper convenience of shippers of livestock.

"The general rule, where such administrative commissions have been created by law and vested with authority to investigate and determine conditions which justify the requirement of proper facilities for the transportation of commodities or passengers, is that a determination or decision upon matters of fact should not be disturbed by appellate courts, unless it clearly appears that such decision is unreasonable or arbitrary or is based upon an erroneous or mistaken theory of the law. *Minneapolis, etc., Ry. Co. v. Railroad Comm. (Wis.)*, 17 L. R. A. (N. S.) 821; *People ex rel. v. Public Service Comm. et al.*, 160 N. Y. Supp. 63; *Hocking Valley Ry. Co. v. Board of Public Ut. Comms. (Ohio)* 110 N. E. 521; *Public Service Ry. Co. v. Board of Public Ut. Comms. (N. J.)* 93 at 585; *State ex rel. v. Great Northern Ry. Co. (Minn.)* 114 N. W. 155.

"We are therefore of the view that the findings and judgment of the trial court should be reversed and the order of the Railway Commissioners requiring the installation of any standard four-ton stockyard scale at the town of Albee should be affirmed. It will be so ordered and adjudged."

In accordance with the statutes of the State of South Dakota, the matter was tried, both in the Circuit and Supreme courts, *de novo*, upon the record made at the hearing before the Board of Railroad Commissioners.

The order of the Board of Railroad Commissioners, affirmed by the Supreme Court, is based upon the following evidence:

The witness, J. C. Cahill, testified that he was a member of the firm of Redman and Cahill, engaged in the business of buying and selling livestock at Albee; that they required stockyard scales at that station for their convenience and for the convenience of the patrons of the Railway Company; that patrons were not satisfied when they had to weigh wherever they could; that it was almost impossible to transact the business of buying cattle without a scale; that they were then weighing upon a scale belonging to a coal dealer just across the right-of-way from the stockyards; that freight rates on stock shipments were uniformly computed upon weights on track scales at terminal points; that they had made no shipment of stock in carload lots to any point in South Dakota; that the only way they could arrive at values allowed the seller of the stock was by weighing it. (Record pp. 4-5, ff. 8-11.)

He further testified that in loading cars, in order to get the correct weights in each so that none should be overloaded or underloaded, the only way was to weigh the stock so as to load the cars to their capacity; that when they shipped a thirty-three foot car they had to pay for 16,000 pounds minimum, and that they liked to get 16,000 pounds into it; that sometimes the car appeared to be overloaded before the animals could get their places when in reality it was not; that he would not put 16,000 pounds in a car if he thought that that would be dangerous to the stock; that he principally guarded against overloading and underloading because it cost just the same to ship; that it was not an easy matter for him to deter-

mine from his experience as a stockman whether or not a car was underloaded; that they paid more attention to the condition of the car as to overcrowding than as to weights, but that after loading a car they sometimes found it too heavy or too light; that they could not see that it was loaded more than a second car, but they found it to be and determined that from the crowded condition of the car; that if they had a stockyard scale by being careful in weights they could tell exactly; that even though they had 16,000 pounds in a car, if the car was not crowded, they would put in another "critter" if it appeared he would be comfortable and safe; that if they had a scale so as to determine weights in advance it would obviate the trouble of sometimes taking cattle out and leaving them for another shipment, and that hoof scales were not used as a means of determining weights upon which freight charges were based. (Record pp. 5-6, ff. 11-13.)

The witness George Redman testified that it was more convenient for them and the man they bought from to have a scale there on account of weighing back and forth on wagon scales, especially in muddy weather; that they could not tell whether they were buying stuff "just right or not" because there were times when a wagon would take up more mud with a load off and on than at other times; that it *would also be handy in the way of loading of cars* as Mr. Cahill had stated, but that these difficulties would be eliminated if they had a stock scale of their own. (Record p. 7, ff. 14-15.)

The witness Thomas Street testified that he had sold cattle and hogs at Albee and had shipped a great many carloads himself; that the principal reason why there

should be stock scales at Albee was in buying cattle that it was almost impossible to take a herd of wild cattle and put them on a common scale; that they could not lead them or hold them steady enough to weigh them; that they needed a box around the scale so they could enclose the cattle and keep them on while being weighed; that he would rather sell to a buyer where there is a scale at the stockyards because they weigh them better and that the scale facilitated business between the purchaser and the seller. (Record pp. 7-8, ff. 15-17.)

The witness Fred Wellatz testified that they ought to have a stockyard scale at Albee because they had so much bother with the scales there when they weighed sometimes at one scale and sometimes at another scale and the fellows were "kicking on it." (Record p. 8, f. 18.)

The witness John Chambers, station agent of the Railway Company at Albee, testified that from May, 1912, to April, 1915, inclusive, there were no carload shipments of livestock from Albee to any point in South Dakota, and that there were only two single animals shipped to a South Dakota point. Exhibit "A", prepared by the witness and received in evidence, shows the shipment of but fifty-six cars of livestock in all during such three years period. (Record pp. 8-10, ff. 18-20.)

The witness Herbert E. Kendree, traveling freight agent of the Railway Company, testified that the weights on livestock for determining the rates on carload shipments were determined by the track scales weight at destination; that the tariffs provided a minimum car capacity upon which freight rates were based; that there were minimum weights upon which the rates for shipment of a single animal were based; that he had never known stockyard

scales to be used for any purpose connected with transportation of livestock, nor for the purpose of determining the weights of livestock upon which freight rates were based, and that such scales were generally used for the benefit of shipper and buyer for their convenience in ascertaining the weights for which the buyer paid, and not for railway purposes. (Record p. 10, ff. 21-22.)

There is no evidence in the record of the cost of constructing or operating the scale ordered.

ASSIGNMENTS OF ERROR.

The Railway Company makes the following assignments of error: (Record pp. 48-49, ff. 103-104.)

1. That the Supreme Court of the State of South Dakota erred in holding and deciding that the plaintiff in error should establish and install stock scales at the station of Albee, in Grant county, South Dakota, because of the duty of plaintiff in error to furnish a shipper such facilities as will enable him to avoid underloading cars where the rate is fixed upon minimum loads, and that the shipper may ascertain the cost of shipping stock in a car in excess of the minimum carload rate.

2. That the Supreme Court of the State of South Dakota erred in holding and deciding that the order of the Board of Railroad Commissioners of the State of South Dakota directing that plaintiff in error install stock scales at the station of Albee, Grant county, South Dakota, for the weighing of livestock, was not a confiscation of the property of plaintiff in error and a deprivation of its property without due process of law, contrary to Section 1 of the Fourteenth Amendment of the Federal Constitution.

3. That the Supreme Court of the State of South Dakota erred in refusing to hold and decide that the said order of the Board of Railroad Commissioners of the State of South Dakota, if enforced, would deprive plaintiff in error of its property without compensation and without due process of law, in violation of Section 1 of the Fourteenth Amendment of the Federal Constitution.

4. That the Supreme Court of the State of South Dakota erred in not affirming the order of the trial court, which order reversed the said order of the Board of Railroad Commissioners of the State of South Dakota, upon the ground that said order of the Board of Railroad Commissioners, if enforced, would deny to plaintiff in error the equal protection of the laws, and would deprive it of its property without due process of law, in violation of the Fourteenth Amendment of the Federal Constitution.

ARGUMENT.

THE ORDER OF THE BOARD OF RAILROAD COMMISSIONERS, AFFIRMED BY THE SUPREME COURT, REQUIRING THE RAILWAY COMPANY TO INSTALL THE SCALE IN QUESTION DEPRIVES THE RAILWAY COMPANY OF ITS PROPERTY WITHOUT DUE PROCESS OF LAW IN VIOLATION OF THE FOURTEENTH AMENDMENT OF THE FEDERAL CONSTITUTION.

This court quite recently had under consideration and decided a case so similar to this that we deem an extended argument or citation of authorities unwarranted.

We refer to the case of *Great Northern Railway Company v. Minnesota Railroad and Warehouse Commission*, 238 U. S. 340, involving the validity of an order of the Minnesota Commission, sustained by the Supreme Court of Minnesota, requiring the installation of a stockyard scale at Bertha, Minnesota. This court decided that the order was in violation of the Constitution, saying:

"Manifestly, if the order is enforced plaintiff in error's property will be taken. Whether this would be without due process of law depends upon the special circumstances.

"The applicable principles were announced in *Oregon Railroad, etc., Co. v. Fairchild*, 224 U. S. 510, 524. A taking of railroad property under administrative regulation must 'be tested by considering whether, in view of all the facts, the taking was arbitrary and unreasonable or was justified by the public necessities which the carrier could lawfully be compelled to meet.' The facts being established the question then presented is whether as matter of law they are adequate to support a finding of requisite public necessity—the mere declaration of a commission is not con-

clusive. *Interstate Commerce Commission v. Louisville & Nashville Railroad Co.*, 227 U. S. 88, 91; *Florida East Coast Line v. United States*, 234 U. S. 167, 185.

"It appears from the supreme court's findings that six-ton scales installed by the railway at 54 of its 259 stock-shipping stations in Minnesota were not used in transactions between carrier and shippers. All witnesses declared these instruments had no direct part in transportation or selling at terminal yards, but were convenient in stock dealings and a station possessing one had an advantage over the place where none existed.

"The business of a railroad is transportation and to supply the public with conveniences not connected therewith is no part of its ordinary duty. The obvious purpose of the challenged order was to enforce installation at Bertha of a scale like those at Eagle Bend and Hewitt and dedicated to the same use. Under admitted facts, unless justified by alleged unlawful discrimination, we think this was an arbitrary and unreasonable exercise of power. It is no answer to say, as counsel do, that the Commission has 'general authority to require railroad companies to supply the necessary demands of the public along transportation lines; that it has a right to require the company to build and maintain such facilities as are necessary for the public needs.' *The demands upon a carrier which lawfully may be made are limited by its duty; and the present record conclusively shows the required structure had no direct relation thereto.* See *New Mexico Wool Growers' Association v. Atchison, Topeka & Santa Fe Ry. Co.*, (N. M.) 145 Pac. Rep. 1077.

"The railway company does not presently controvert the finding that scales at Eagle Bend and Hewitt brought about discrimination, but maintains the commission acted arbitrarily and unreasonably in seeking to eliminate this by peremptorily requiring construction of another without giving opportunity to accomplish the same result through discontinuing the use of those already installed. This contention is sound and must be sustained. Conceding power to inhibit discrimination the commission could not exer-

cise it unreasonably by needlessly taking property or, what comes to the same thing, obliging incurrence of expenses wholly unnecessary. It by no means follows simply because a railroad voluntarily supplies a convenience at some stations which attracts trade, that it can be commanded positively to do likewise at other places along the line. A railroad's possessions are subject to its public duty but beyond this and within charter limits, like other owners of private property, it may control its own affairs. Discontinuing the use of existing scales would abate the alleged discrimination and probably entail little, if any, outlay. The commission's order precluded use of this method to bring about lawful conditions and therein, we think, was plainly arbitrary and unreasonable. *Missouri Pacific Railway v. Nebraska*, 164 U. S. 403, 417; *Donovan v. Pennsylvania Company*, 199 U. S. 276, 293; *Missouri Pacific Railway v. Nebraska*, 217 U. S. 196, 206." (Italics are ours.)

The evidence upon which the Minnesota order was based did not differ materially from that relied upon to sustain the order we now complain of. In both cases it appears that the principal reason for desiring the scale was that it would facilitate the transaction of private business between buyers and sellers of livestock. The Supreme Court of South Dakota in passing upon the contention of defendant in error that shippers have the right to demand a scale for such purpose said that the fallacy of the proposition was "so clear that discussion would be idle," but based its judgment affirming the order of the Commissioners upon the testimony of the complainants, Cahill & Redman, to the effect that the scale would be convenient for their use in weighing stock before loading it for shipment, saying:

"The furnishing of stockyard scales by the carrier, at the point of shipment of livestock by means of

which the shipper may ascertain the minimum loading of cars as well as excess loading, so far pertains to the business of transportation itself, as to constitute such scales a reasonable facility for transacting its business with shippers at the initial point of shipment. The reasonableness of such requirement, however, depends, in each instance, upon surrounding circumstances and conditions. The judgment appealed from appears to have been based largely upon the theory that stockyard scales are not an instrumentality of transportation of livestock, although the trial court found that such a scale is not a facility necessary for the safety, convenience and accommodation of the public, at the town of Albee. The evidence is undisputed as to the amount of livestock shipped each year during the three years preceding the hearing, but we are not convinced that the installation of a four-ton stock scale as ordered by the Board of Railroad Commissioners is not actually and reasonably necessary for the proper convenience of shippers of live stock."

The two cases, however, do not differ in that respect. The facts of the Minnesota case, appearing in this court's opinion, quoted from the opinion of the Minnesota Supreme Court, include the following: "*that where these scales are available shippers are accustomed to weigh their stock, for their own convenience and information, immediately before loading for shipment, but these weights are not used as a basis for freight charges, nor on any transactions between the shipper and the Railway Company, nor in sales made at the terminal stockyards.*" (Italics are ours.) No stronger statement may properly be made of the analogous facts in this case, upon which, as we have said, the South Dakota Supreme Court based its decision.

All the witnesses for complainants testified, in substance, that the reason they desired the scale was to enable them to more conveniently buy and sell live stock. The

record leaves no room for doubt that such desire and it alone prompted the complaint to the commissioners. The feature of weighing before loading was an after-thought of the complainant, Cahill, and even he only attempted to establish the fact that the scale would be *convenient* for the purpose of assisting him in determining in advance how many head of stock he should attempt to load in a car. The only other witness who referred to that feature was his co-complainant and partner, Redman, who reached the same conclusion we have, saying: "*It would also be handy* in the way of loading cars, as Mr. Cahill stated" (Record p. 78, 14). Certainly a finding that a scale is a transportation facility, for which there exists such a public necessity as to warrant the taking of the railway company's property may not be based upon such evidence.

To one familiar with loading stock the claim that the scale would be used for loading purposes readily appears to be what it really is—a mere subterfuge, resorted to in the attempt to furnish some slight foundation for an order requiring the railway company to furnish a convenience for the transaction of complainants' business.

It is well known, and so appears from the record, that in loading stock for shipment, what is principally guarded against is the overcrowding of a car so the stock will not ride safely and comfortably. Whether a car is so overloaded is readily apparent without reference to weight. If 16,000 pounds (the tariff minimum) would not ride with safety the shipper would not put that weight in the car but would and does put in more than that weight when he can do so without overcrowding. The mere fact that occasionally a shipper errs in his judgment and has to take out an animal or two before the shipment moves can-

not be a sufficient basis for the order complained of. We might argue this question more fully if the record contained any evidence "by which to compare the advantage to the public with the expense" to the railway company, but in that respect it is silent.

There is no evidence in the record from which the court may find: that a stockyard scale is a transportation facility; that public necessity requires the installation of such a scale at Albee, South Dakota, in order to enable plaintiff in error to properly perform its duties to the public as a common carrier, or that the expense caused plaintiff in error by such installation would be justified by the advantage to the public in its proper use of the scale.

The conclusion of this court in *Washington ex rel. Oregon R. & N. Co. v. Fairchild*, 224 U. S. 510, is most applicable:

"There is nothing by which to compare the advantage of the public with the expense to the defendant, and nothing to show that, within the meaning of the law, there is such public necessity as to justify an order taking property from the company."

We respectfully submit that the judgment of the Supreme Court of South Dakota should be reversed, and the order in question declared to be in contravention of the constitutional rights of the Railway Company.

E. C. LINDLEY,

M. L. COUNTRYMAN,

St. Paul, Minn.,

F. R. AIKENS,

H. E. JUDGE,

Sioux Falls, S. D.,

Attorneys for Great Northern Railway Company, Plaintiff in Error.

FILED

OCT 10 1918

JAMES D. MAHER

Supreme Court of the United States

OCTOBER TERM, 1918

No.  124

GREAT NORTHERN RAILWAY COMPANY, PLAINTIFF
IN ERROR,

vs.

J. C. CAHILL AND GEORGE REDMAN, CO-PARTNERS AS
REDMAN & CAHILL, AND THE BOARD OF RAIL-
ROAD COMMISSIONERS OF THE STATE OF
SOUTH DAKOTA, DEFENDANTS IN ERROR.

In Error to the Supreme Court of the State
of South Dakota.

BRIEF OF DEFENDANTS IN ERROR

CLARENCE C. CALDWELL, Attor-
ney General, Sioux Falls, South
Dakota,

P. W. DOUGHERTY, Pierre, South
Dakota,

OLIVER E. SWEET, Assistant At-
torney General, Pierre, South
Dakota,

Attorneys for Defendants in Error.



INDEX

Stock Yard Scales a Transportation Facility	11
Public Demand and Necessity for Stock Yard Scales at Albee	15

CASES CITED

Cahill v. Great Northern Ry. Co., 166 N. W. 306	10
Great Northern Ry. Co. v. State of Minn., 238 U. S. 340	3, 5, 14
New Mexico Wool Growers' Association v. A. T. & S. F. Ry. Co., 145 Pac. 1077	14, 17
New York & Queens Gas Co. v. McCall, 245 U. S. 345.....	2
Turner Creamery Co. v. C. M. & St. P. Ry. Co., 36 S. D. 310.....	4
Washington O. R. & N. Co. v. Fairchild, 224 U. S. 510....	4, 15

Supreme Court of the United States

OCTOBER TERM, 1913

No. 481

GREAT NORTHERN RAILWAY COMPANY, PLAINTIFF
IN ERROR,

vs.

J. C. CAHILL AND GEORGE REDMAN, CO-PARTNERS AS
REDMAN & CAHILL, AND THE BOARD OF RAIL-
ROAD COMMISSIONERS OF THE STATE OF
SOUTH DAKOTA, DEFENDANTS IN ERROR.

In Error to the Supreme Court of the State
of South Dakota.

BRIEF OF DEFENDANTS IN ERROR.

In this proceeding, brought originally before the Board of Railroad Commissioners of the State of South Dakota, the complainants prayed for an order to be issued by the Board requiring the Great Northern Railway Company to install and maintain at the station of Albee, in connection with the stock yards at that station, a scale suitable for weighing live stock loaded into and unloaded from cars at that point. After regular proceedings upon the complaint, including the giving of notice of hearing, the holding of a hearing before the Board of Railroad Commissioners, at which sworn testimony of witnesses was received, and after carefully considering the record, the Board made its order commanding the Great Northern Railway Company to construct and put into operation at Albee not later than April 15th, 1916, a four ton Fairbanks-Morse stockyards scale. Thereafter an appeal was taken from the order of the Board of Railroad Commissioners, pursuant to the provisions of Chapter 312 of the Session Laws of 1913 of the State of South Dakota, to the circuit court within and for Minnehaha County. The record of proceedings before the Board was thereupon certified to the circuit court, and thereafter the cause was heard by and submitted to the circuit court upon the record made before the Board of Railroad Commissioners without any additional

evidence taken in that court. The decision of the circuit court was that the order of the Board of Railroad Commissioners was arbitrary and unreasonable, and that the same should, therefore, be reversed. From this decision of the circuit court an appeal was perfected to the state Supreme Court by the Board of Railroad Commissioners, in accordance with the provisions of Chapter 312 of the Session Laws of 1913 of South Dakota. The Supreme Court in its decision reversed the state circuit court and affirmed the order made by the Board of Railroad Commissioners. The cause was brought to the Supreme Court of the United States upon a writ of error to the state Supreme Court, and the decision of that court is here presented for review.

Under these conditions, and because of the form in which this case is presented, the rule is well settled that in its consideration of the case this court "is confined to the Federal question involved, and, therefore, has not the authority to substitute its judgment for that of an administrative commission as to the wisdom or policy of an order complained of, and will not analyze or balance the evidence which was before the Commission for the purpose of determining whether it preponderates for or against the conclusion arrived at, yet it will, nevertheless, enter upon such examination of the record as may be necessary to determine whether the Federal right claimed has been denied; as, in this case, where there was such a want of hearing or such arbitrary or capricious action on the part of the Commission as to violate the due process clause of the Constitution."

People of the State of New York, ex rel, New York and Queens Gas Company, vs. Edward E. McCall, et al, 245 U. S. 345, 38 Sup. Ct. Rep. 122, P. U. R. 1918A, 792.

Albee is one of the regularly established stations in Grant County, on the line of the Great Northern Railway Company extending northeasterly from the city of Watertown, South Dakota. Beyond Albee the Great Northern Railway Company's line extends by a reasonably direct route to St. Paul, which is one of the great live stock markets in the Northwest. In the vicinity of this station farmers are engaged quite extensively in producing and feeding hogs and cattle. Albee is the natural shipping point for a large amount of this live stock, both because of its location and because of the favorable conditions under which shipments may be made from that vicinity over the line of the Great

Northern Railway Company to St. Paul. The railway company maintains suitable stock yards at Albee but it has never provided scales for use in connection with the stock yards. Other stations on other lines of railroad in that general vicinity have been provided with stock yard scales, and the evidence shows that on that account shippers, sometimes at considerable delay and inconvenience to themselves, have taken their live stock away from the vicinity of Albee to such other stations because of the added convenience in connection with shipping afforded by stock yard scales at the other stations.

The reason that has always been urged by the railway company for its failure to provide scales at Albee, and the defense which that company made in this case, was that stock yard scales are not a necessary transportation facility under the decision of the Supreme Court of the United States in the case of Great Northern Railway Company vs. State of Minnesota, 238 U. S. 340. For this reason the effort of witnesses for the complainants at the hearing before the Board of Railroad Commissioners, was to prove the fact that in connection with the transportation of live stock from Albee, South Dakota, stock yard scales would be a transportation facility and would serve a transportation purpose. In the opinion of the Board of Railroad Commissioners, and likewise in the opinion of the Supreme Court of the State of South Dakota, the complainants succeeded in establishing the necessity for scales in connection with the stock yards at Albee as a transportation facility.

In arriving at their conclusions the Board of Railroad Commissioners and the state Supreme Court did not overlook the decision of the Supreme Court of the United States in Great Northern Railway Company vs. State of Minnesota, *supra*, and they did not attempt in any way to disregard the effect of that decision. On the other hand, they gave full recognition to the validity of the decision upon the record in that case. They were convinced, however, that the record in the instant case serves to distinguish this case from the Minnesota case, so that the decision of this Court in the former case is not controlling in the present case. We shall refer further to this proposition at another place in this brief.

No question has been raised with reference to the regularity of proceedings before the Board of Railroad Commis-

sioners. A complaint and a call and demand were regularly served upon the defendant railway company. Thereafter, the defendant served and filed its answer to the complaint. The cause was set down for hearing before the board, a notice of the time and place of hearing was regularly served on the defendant, and the defendant appeared at the hearing with its counsel and was afforded every opportunity for cross examination of the complainants' witnesses and for the introduction of testimony in support of the averments in its answer. These proceedings afforded to the defendant the protection guaranteed to it under the provisions of the Constitution of the United States, and were such that they afforded to the defendant due process of law.

State, ex rel, O. R. & N. Co. vs. Fairchild, 224 U. S. 510, 32 Sup. Ct. Rep. 535.

Turner Creamery Company vs. C. M. & St. P. Ry. Co., 36 S. D. 310.

Therefore, the only question for determination in this court is whether the Federal right claimed by the defendant has been denied by the order of the Railroad Commission and the decision of the state supreme court. The determination of this question is dependent upon the other question, whether or not, upon the record in this case, it appears that scales at stock yards are a transportation facility.

The defendants in error proceed in this case upon the assumption that the opinion of the Supreme Court in the case of Great Northern Railway Company vs. State of Minnesota, *supra*, was based solely upon the record in that case, and that the conclusion announced was one applicable specifically to the record in that case; and that the court did not, in that decision, intend to lay down the proposition, as a universal rule, that stock yard scales are not a transportation facility or do not serve any useful transportation purpose. There would be no further room for argument and this case would have no standing in this court if it were to be said that in the Minnesota case the court had definitely and for all time determined that, under any and all circumstances, stock yard scales have no part in the transportation activities of common carriers.

It is the contention of the defendants in error that there is this essential difference in the state of the record and in the bases for the decisions of the respective railroad commissions in the Minnesota case and in the instant case; that

whereas the record before the commission, and the decision of the commission, in the Minnesota case on the one hand proceeded upon the assumption that the Railroad & Warehouse Commission of the state of Minnesota had the power to require the railroad company to provide stock yard scales at Bertha in order to remove an unjust discrimination against that point, brought about by the railway company in failing to maintain scales at Bertha while it maintained such scales at Eagle Bend, Hewitt and other railway stations in that general vicinity; on the other hand, in the instant case, the record was made and the decision of the South Dakota Board of Railroad Commissioners was based solely upon the theory that stock yard scales contribute to the convenience of handling stock preparatory to shipment at primary shipping points; that such scales are not only useful but necessary to enable shippers to determine whether they are loading cars to approximately the minimum tariff rating or capacity, and also to enable shippers to make and preserve a record of the weight of live stock shipments as a check and means of protection against destruction of live stock in transit and against unusual shrinkage due to delay in transportation between point of origin and point of destination.

The opinion of the Federal Supreme Court was conclusively that alleged discrimination was the ground upon which the Railroad Commission of Minnesota assumed to compel the Great Northern Railway Company to install stock yard scales at Bertha. In its opinion the court quoted from the Supreme Court of Minnesota as follows:

"The witnesses testifying for respondent insisted that stock scales were a convenience, if not a necessity, in dealing in stock, and that a town having such scales possessed an advantage, as a stock market, over a town that did not, but frankly admitted that these scales had no direct part in the business of transportation, nor in the business of selling at the terminal yard.

As scales are a convenience, and, probably a necessity in dealing in stock, and tend to cause stock to be collected for shipment at the places where they are available, to the disadvantage of those places where they are not available, and are undoubtedly furnished for the purpose and with the view of securing the transportation of stock from the points at which they are located, it is the opinion of the majority of the members of the court

that the evidence submitted, together with the fact that the company considered such scales of sufficient importance to its business to furnish them voluntarily at fifty-four of its stock yards in this state, is sufficient to support the finding that such scales pertain to the transportation facilities which the commission may require of a railroad, and that the refusal to supply such scales to the station in question was a discrimination against it."

In their briefs and arguments before the United States Supreme Court counsel for the opposing sides in the Minnesota case agreed that the main issue, or the main feature in the case was, as expressed at the hearing before the Railroad Commission by Judge Mills, that the railway company put their scales on each side of Bertha, namely, at Eagle Bend and Hewitt, and this being common territory from which stock was drawn, that it was a matter of discrimination. In its so-called statement of propositions deducible from the record in the Minnesota case, the plaintiff in error therein contended that the order made by the Railroad & Warehouse Commission was solely for the purpose of removing what, in the judgment of the commission, was a discrimination against Bertha and the stock men in that vicinity; that discrimination was the issue of fact considered and tried in the district court; that the Supreme Court of Minnesota upheld the order of the commission on the ground that the commission had sufficient authority to prevent unjust discrimination; and that the facts in the case supported the finding of the commission and the lower court that it was discrimination for the railway company to afford Hewitt and Eagle Bend and stock men in the vicinities thereof the convenience of stock scales, while it failed to furnish a like convenience at Bertha.

Likewise in the syllabus of the opinion of the Supreme Court of Minnesota, which was written by the judge who prepared the opinion, it was made to appear that discrimination was the controlling issue in the case. In the syllabus there was the following statement:

"It sufficiently appears from the evidence and from the fact that the appellant has voluntarily installed stock scales at fifty-four of its stations in Minnesota, that such scales are a convenience pertaining to the transportation of stock, and that its refusal to furnish them at the station Bertha was such a discrimination

against that place that the Railroad & Warehouse Commission had authority to require them to be supplied at that station."

The references to the courts' opinions and to the contentions of the parties to the case in this Court indicate beyond question of doubt that the issue in the Minnesota case was that of an alleged discrimination against Bertha and the stock men doing business at that point.

The record in this case shows a situation altogether different from that presented to this court in the Minnesota case. It will be noted in the first place that the complaint does not contain any allegation of discrimination. (Tr. of record, folio 11-12.) Moreover, in the testimony of the complainant, Cahill, there appears the following statement:

"The only way I can arrive at values of the stock is by weighing them. That is the value we allow the seller. There are lots of times we have two or three carloads of stock in the yards at one time, and there may be a thirty-three foot car and a forty-four foot car, and in order to get the correct weights in each one so as to not have one overloaded and one underloaded, the only way is to weigh up the stock so as to load the cars to their capacity. It is not a fact that in loading for shipment we ordinarily endeavor to load in a car just a sufficient number of animals so there is no danger from crowding or suffocation. For instance, when we ship a thirty-three foot car, we have to pay for 16,000 pounds, whether it is there or not, and of course, we like to get 16,000 pounds in it. Sometimes the car appears to be overloaded, when in reality it is not, before the animals get their places. I would not put 16,000 pounds in the car if I thought that would be dangerous to the stock. You cannot get over 16,000 pounds in the car without overloading it. I am certain about that, especially in warm weather. Of course, the size of the hogs and their weight cut a big figure in regard to that. * * *

The main thing with me is to guard against overloading and underloading because it costs just the same to ship, whether it is there or not. It is not an easy matter for me to determine from my experience as a stockman whether a car is underloaded or not. If we could keep each man's stuff separate as it comes in, we could get at it quite closely, but the stock is mingled and we don't

know where we are at in regard to weights. We pay more attention to the condition of the car as to overcrowding than we do as to weights, but I find when we load the car up to where we think it is to be loaded and get the second car down to the chute, I find the first car is too heavy or too light. I can't see that it is loaded more than the second car, but it is. * * * Quite often we have mixed stuff, cattle and hogs. We have to load our cattle first, and they probably take up half or more of the car; then we put up the partition, run the hogs in and find we don't have room and we have to take the hogs out, take the partition down, take the cattle out and leave the cattle and ship them in another shipment. If we had a scale so as to determine that fact in advance, it would obviate such trouble. I have had that occur here and at Nassau several times. We had a scale at Nassau and knew what we were at and hired the stuff hauled up here so as to correct that condition." (Tr. of record, folios 11-13.)

Likewise the other complainant, George Redman, testified as follows:

"It would also be handy in the way of loading the cars as Mr. Cahill stated, and where you have more than one load so as to get your stock divided so that it will ride comfortably. I recall two times when there were parties at Watertown who would like to have bought hogs from us here, and we were unable to sell them on account of not having any way to weigh them." (Tr. of record, folio 15.)

That the Board of Railroad Commissioners based its decision in this case squarely upon the proposition that stock yard scales at Albee would be a transportation facility and would be intimately related to the transportation service which the railway company is bound to perform for the public, and that the matter of discrimination was not a consideration in the minds of the Railroad Commission, are clearly indicated in the following excerpts from its opinion:

"In the early history of the transportation of live stock the railway companies recognized the necessity of the installation of a stock yard scales at stations where the live stock was received for shipment. It is a matter of common knowledge in this state that stock scales are uniformly established by railway companies at stock

yards for the convenience of the public in weighing live stock into the stock yards, whether the scales be used in that respect by stock buyers in making settlement with their customers or by individual shippers who ship stock in carloads. It is also a well recognized fact, commonly understood, that there are large numbers of persons within this state who ship and sell their own live stock and have no transactions whatever with stock buyers. While it is true where stock yard scales are installed they are used as a basis for settlement between the buyer and his customer, it is also true that they are likewise used by individual shippers for the purpose of weighing their live stock into the stock yard prior to shipment to the ultimate markets. The stock buyers themselves and individual shippers desire to inform themselves as to the weight of the live stock which they are about to load into the cars for transportation; and while it is true that destination weights, if correct, govern generally in fixing the freight charges on both carload and less than carload freight, it has uniformly been the custom ever since the shipment of live stock began, to take the weights at the points of origin.

* * * Again, under the tariffs of the defendant in this case, the minimum weight on live stock varies with the size of the car, and there is uniformly a lower minimum on hogs than on cattle or sheep, for reasons which are quite apparent. It is necessary for the shipper to load at least the minimum weight into the cars if he would avoid the paying of freight on that which is not contained in the car and where a number of carloads are to be loaded, unless the total live stock to be shipped has been weighed into the yard, it may frequently become necessary for the shipper to use the scale in arriving at the weights to be loaded into each car. In fact the testimony in this record shows that such instances have arisen at Albee and that scales are necessary not only for weighing the stock purchased from farmers, but also for the proper loading of the stock into the cars. It may be true that the cars could be loaded without the stock scales, but it is also true that the cars could be loaded without stock yards, although the courts have uniformly held that stock yards are a necessary facility for the handling of live stock at the points where

loaded and unloaded. In fact, it has been held that stock yards constitute a carrier's live stock depot the same as freight warehouses constitute the carrier's freight depot for the receipt, weighing and loading of less than carload freight." (Tr. of record, folios 41-44.) Elsewhere in its report the commission said:

"Live stock scales are not only a necessary facility for the settlement between buyers and sellers, but also for the accommodation and use of shippers of all classes, those who are buyers and those who are individual shippers handling their own live stock for the purpose of ascertaining the correct weight of live stock loaded into cars to be shipped from that station, as well as live stock received into the yards from cars there unloaded. Entertaining these views, based on our experience and actual knowledge of the situation in this state, we must, therefore, respectfully decline to subscribe to the doctrine that scales are not necessary facilities at stock yards in this state.

"Where scales are furnished at stock yards, all live stock loaded or unloaded at that station may be accurately weighed into or out of the cars and the shipper will then know the actual weights of live stock shipped from or received at that yard. Under the statute enacted by the Legislature at its last session, this board has provided a method whereby stock yard scales, and other scales of a similar kind, are tested and inspected by a competent scale man experienced in the construction of scales and equipped to make thorough inspection and tests." (Tr. of record, folio 46.)

Finally in its opinion reported, in 166 N. W. Rep. 306 the state supreme court said:

"The furnishing of stock yard scales by the carrier at the point of shipment of live stock by means of which the shipper may ascertain the minimum loading of cars, as well as excess loading, so far pertains to the business of transportation itself as to constitute such scales a reasonable facility for transacting its business with shippers at the initial point of shipment. The reasonableness of such requirement, however, depends in each instance upon surrounding circumstances and conditions. The judgment appealed from appears to have been based largely upon the theory that stock yard

scales are not an instrumentality of transportation of live stock, although the trial court found that such a scale 'is not a facility necessary for the safety, convenience and accommodation of the public,' at the town of Albee. The evidence is undisputed as to the amount of live stock shipped each year during the three years preceding the hearing; but we are not convinced that the installation of a four-ton stock scale, as ordered by the Board of Railroad Commissioners, is not actually and reasonably necessary for the proper convenience of shippers of live stock." (Tr. of record, folio 80.)

We believe that we have shown by the foregoing references to the record in this case that, unlike the Minnesota case, the question of discrimination was in no sense controlling in this case, and that, on the other hand, the decisions of both the Railroad Commission and the state supreme court were placed squarely upon the ground that stock yard scales were a necessary and proper instrumentality of live stock transportation, and that as such the Board of Railroad Commissioners, acting within its legal discretion, was justified in ordering the installation of such scales in connection with the stock yards at the station of Albee. Because of the dissimilarity in the issues presented by the record in this case and those presented by the record in the Minnesota case, we submit that the former case is not controlling and is not in point in this case. It is, therefore, for this Court, upon this review, to determine, first, whether or not the Board of Railroad Commissioners and the state supreme court were in error in concluding, as they did, that the record in this case shows that stock yard scales at Albee would be a transportation facility and would serve a transportation purpose, and second, whether or not the Board of Railroad Commissioners and the state Supreme Court erred in holding that the record in this case disclosed a public demand and necessity for the installation of stock scales at Albee.

Stock Yard Scales at Albee are a necessary Transportation facility and as such may be required to be installed by Order of the Railroad Commission.

It is doubtful if any more convincing evidence as to whether or not stock scales are a transportation facility could be furnished than the action and attitude of the railway companies themselves in the matter of voluntarily furnishing scales at stockyards established by them at

their several stations in this and in other states. Pursuant to permission granted by the railroad commission at a second hearing in this matter, the complainants introduced a series of statements compiled from reports made by the several railroads doing business in this state, showing for the stations upon these lines of railway, the number, capacity and name of manufacturer of stock scales in actual use at stockyards. The said statements were received in evidence, and may be briefly summarized as follows: At each of the ten stations on the branch of the C. St. P. M. & O. from Valley Springs, South Dakota, to Mitchell, there is established in connection with the stockyards and owned and operated by the railway company one Howe scale of 75000 lbs. capacity. On the lines of the Chicago & Northwestern in South Dakota, according to a report emanating from the office of the engineer of maintenance dated July 27, 1915, on file in the office of the railroad commissioners, at each of the sixty-seven stations of that railway company in this state there is a stock scale of various standard makes, having a capacity varying from 6000 lbs. to 11,000 lbs. On the Puget Sound line of the Chicago, Milwaukee & St. Paul Railway Company, west of the Missouri River, there are according to a letter contained in this record from H. B. Earling, vice president, a stock scale at La Plant and another at Walker, South Dakota, both manufactured by the Fairbanks-Morse & Company, and each of four tons capacity. At one hundred fifty stations on the C. M. & St. P. east of Mobridge, South Dakota, this railway company maintains in connection with its stockyards, stock scales of the Fairbanks-Morse & Co. make, each scale being of the four-tons capacity, except the scale at Aberdeen, which is one of the twenty-tons capacity, and the scale at Mitchell, which is one of fifty-tons capacity. At each of the three stations on the line of the Mpls. St. P. & S. S. M. railway company in this state, there are maintained by the railway company stock scales of the Fairbanks-Morse and Company make, each having a capacity of 12,000 pounds. At nineteen stations on the Great Northern Railway Company in this state the defendant railway company maintains in connection with its stockyards, six-ton Fairbanks-Morse & Co. scales. At nineteen stations on the M. & St. L. railroad in South Dakota, there are maintained by the railway company Fairbanks-Morse & Co. stock scales, having a capacity varying from 4000 to 10,000 lbs. At ten stations

on its lines, the C. R. I. & P. railroad company maintains in this state in connection with its stockyards, stock scales of different makes of the four-tons capacity type. The South Dakota Central Railway Company, now a branch of the Great Northern Railway Company, and known as the Watertown & Sioux Falls Railway Company, maintains at fourteen of its stations in this state in connection with its stockyards, stock scales of different makes, varying in capacity from 5,000 to 90,000 lbs. The Illinois Central Railroad Company at three stations on its lines in this state maintains stock scales manufactured by that railroad company itself of six-tons capacity.

It appears that these railway companies established these scales voluntarily at the time of construction of their stock yards. These scales represent a large investment; many of them were established prior to the time when there was any effort at public regulation of the affairs of common carriers in this state. The fact that such scales were installed in this manner, and under these circumstances, and at the expense incurred in that connection, is the most persuasive evidence of the railway companies' own belief that such scales were and are a necessary part of the equipment or facilities of a railway company in handling its livestock business.

It is a fair inference that the expense of installing and of maintaining stockyard scales throughout this territory is one of the elements which has been taken into consideration by the railway companies and by the public regulating bodies in determining reasonable rates for the transportation of livestock, and every shipper, in the rate that he pays, is making his proportionate contribution to the expenses that the railway companies have incurred in the past in connection with their stock scales. This is true of shippers at Albee, as well as of shippers at other points, and the result is, that the complainants in this case are compelled to pay rates for the transportation of their live stock that will compensate the railway companies for their investment in stock scales, and yet these complainants have not the benefit of such scales in connection with their shipments of live stock over the lines of the defendant railway company.

Furthermore the testimony of witnesses, Cahill and Redman, heretofore quoted in this brief, indicates very clearly the exact particulars in which stock yard scales are related to the business of transportation in which the defendant railway company is engaged, namely, that such scales consti-

1
3

tute the means by which the shipper may ascertain whether he is loading the minimum weight in his car, or is overloading the same.

In addition to this need of stock scales at stockyards for the purpose of determining whether cars are loaded at approximately the maximum weights or not, such stockyard scale weights are obviously very useful in enabling the shipper and the carrier to correct or adjust any error that may be made in the weighing of the carload of stock on track scales at the terminal market; and such stockyard scale weights are likewise clearly of exceeding value to a shipper in connection with a claim for loss or damage of live stock in transit when the said live stock has been lost or damaged between the point of shipment and track scales at destination, especially in view of the provisions of the act of congress, known as the second Cummins amendment, which has the effect of precluding a common carrier of interstate live stock from contracting for a value on live stock less than the actual value thereof.

The foregoing facts standing out clearly in this record place complainants in this proceeding upon a different basis from that of the complaining parties in the case of Great Northern Railway Company v. Minnesota, Supra, and the complainants in the case of New Mexico Wool Growers Association v. A. T. & S. F. Ry. Co., Supra. In both of those cases the parties complainant failed because of their failure to show a necessity for the maintenance of stock scales in connection with any business transacted between the shipper and the carrier. This record supplies the omission in the records in those cases, and this case is, therefore, to be distinguished from these two cases upon which the defendant relies. That such evidence as appears in this record was entirely wanting in the record in the case of Great Northern Railway v. Minnesota Railroad & Warehouse Commission, Supra, appears from the following statement contained in the opinion of Mr. Justice McReynolds:

"It appears from the supreme court's finding that six-ton scales installed by the railway company at 54 of its 259 stock shipping stations in Minnesota were not used in transactions between carrier and shipper. All witness declared these instruments have no direct part in transportation or selling at terminal markets, but were convenient in stock deals and a station possessing one

had an advantage over the place where none existed."

The Record Clearly Shows a Public Demand and Necessity for Stock Yard Scales at Albee.

In view of the facts established by the evidence in this case, it cannot be said that the Board of Railroad Commissioners acted unreasonably or arbitrarily in making the order requiring the installation and maintenance of the stock scales in question. We concede that under the doctrine of the supreme court of the United States in the case of Washington, ex rel. O. R. & N. Co. vs. Fairchild, supra, the order which the Board of Railroad Commissioners made in this case would be a taking of the defendant's property without due process of law and without just compensation, if the evidence were insufficient to show a public demand or necessity for the facility required in the order to be provided, or, if such facility were one which the railway company could not be required in any case to furnish pursuant to its duty to the public as a common carrier of property. On the other hand, the record in this case is clearly sufficient to establish the fact of public demand and necessity for a stock scale at Albee, and is sufficient in addition thereto to show the particulars in which such facility would be of real and substantial benefit and advantage to both the carrier and shipper at that point. The case of Washington, etc., O. R. & N. Co. v. Fairchild, supra, recognizes the rule to be that each case of this nature is dependent upon its own facts and circumstances, and that no general rule can be laid down in one case which would apply in all other cases. A general rule cannot be made to apply in other cases where the facts and circumstances are shown to be materially different. From the fact that the Supreme Court held, in Great Northern Railway Company v. Minnesota, etc., supra, that stock scales were not useful in connection with the business of transportation or in connection with the performance of any duty which the railway company was required to perform for the public, it cannot be argued that everywhere and under all conditions and as a universal rule, stock scales are not useful in connection with transportation or necessary in connection with any duty which the carrier owes to the public. This case stands upon its own merits, unfettered by any rule announced in general terms in a different case depending upon a record showing a very different condition from that shown to exist in this case.

One of the complainants testified that on one or more occasions parties at Watertown desired to purchase stock from the complainants at Albee. The witness pointed out that he was unable to transact business with the Watertown party because there were no stock scales on the line of the Great Northern Railway, either at Albee or at Watertown. An instance of that kind illustrates how, in connection with the particular situation existing at Albee, stock scales at either Albee or Watertown might very conveniently be used in determining the freight charges that the railway company should assess against a shipment of live stock moving between Albee and Watertown. The live stock industry appears to be on the increase among the farmers in the northeastern part of this state. Watertown is the most important city in that locality. With the further growth of the live stock industry there will be further demands for the shipment of live stock to that city. If track scales have not been provided, stock scales at the stock yards will be the only means by which weights upon shipments moving to that point over the line of the Great Northern Railway Company can be determined. To this demand for accurate weights upon which to base freight charges, it is not a sufficient answer to say that the railway companies by rule have established minimum weights. The minimum weight is often distinctly a maximum weight from the point of view of the live stock shipper. One of the complainants testified that it was not possible in warm weather to load a stock car to the existing minimum for hogs. These minimum weights have been established by the railway companies on a basis which will assure to them, under all ordinary circumstances, full compensation for every pound of live stock transported. It is the shipper who is vitally concerned in knowing whether or not he has loaded a car to the established minimum, or, whether he will be obliged to pay freight charges upon an assumed weight which is represented by the margin between the actual weight of his load and the minimum established by the railway company, and which does not represent a pound of freight hauled by the carrier.

As we have stated at another place in this brief we do not consider the case of Great Northern Railway Company vs. Minnesota, Supra, controlling in this case for the reason that the main issue in that case was whether or not the railroad and warehouse commission of Minnesota could require

the railway company to install and maintain stock scales at Bertha, in order to remove discrimination against that station resulting from the fact that such scales had been installed and were in operation at neighboring stations on the Great Northern line. As we have shown elsewhere, the pleadings, the evidence and the decisions of the commission and of the courts in that case, all related to the question of discrimination. Furthermore, in its opinion, this Court stated that if, as a matter of fact, such discrimination existed, the order made by the Railroad & Warehouse Commission of Minnesota would have been such as to permit the railway company to remove the discrimination by abandoning the scales at stations where the same were in operation because the discrimination would be removed as effectively in that manner as it could be by installing scales at Bertha, and the railway company should be permitted to exercise its independent discretion as to the manner in which it should remove the discrimination.

The only case in addition to the Minnesota case which appears to have involved directly the question as to whether or not stock yard scales are a transportation facility, is the case of New Mexico Wool Growers Association vs. A. T. & S. F. Ry. Co., 20 N. M. 33, 145 Pac. 1077. Upon the record in that case the corporation commission of New Mexico was of the opinion that the stock yard scales desired by the complainants had not been shown to be a transportation facility. In its decision the court pointed out that the evidence in the case showed that shippers of live stock in that state made a practice of loading live stock to the convenient and safe capacity of the car, regardless of minimum weights as ascertained by the use of stock yard scales. The court in its decision also directed attention to the fact that at practically every point at which the complainant association requested the installation of stock scales in New Mexico, there were in operation privately owned scales which shippers were permitted to use for a slight compensation. This fact, of course, had an important bearing upon the public necessity for stock scales to be installed by the railway company at the stations referred to in the complainant's petition. The record in the present case shows that the situation at Albee differs from the situation as disclosed in the record in the New Mexico case. At Albee it appears that there are no private scales which are suitable for weighing live stock. Furthermore, we

submit that it appears from the testimony of witnesses Cahill and Redman quoted above in the brief, that the weights as determined from stock yard scales are a very important and controlling consideration in connection with the loading of live stock for shipment. As stated by witness Cahill:

"The main thing with me is to guard against over-loading and under-loading because it costs the same to ship whether it is there or not."

It is, of course, not contended that a shipper would insist upon crowding in the minimum weight of a car of live stock simply for the sake of getting the minimum into the car, but, we are confident that the testimony in this case shows beyond any question of doubt the great value and usefulness, as well as the convenience, of stock scales used in connection with loading live stock into stock cars.

There is no law of South Dakota relating specifically to any requirement that railway companies shall install scales in connection with their stock yards. In this respect the statutes of South Dakota are similar to those of Minnesota and other states where general supervision and control over the affairs of transportation companies have been delegated to railroad or public service commissions.

Section 2 of Chapter 207 of the Laws of 1911 of the state of South Dakota defines in general terms the powers and duties of the Board of Railroad Commissioners. That section is in part as follows:

"The Board of Railroad Commissioners shall have the general supervision of all common carriers in the state (street railways excepted) and shall inquire into any neglect or violation of the laws of this state by any common carrier doing business herein, or by the officers, agents or employes thereof, and shall also from time to time carefully examine and inspect the condition of each common carrier in this state, and of its equipment, and the manner of its conduct and management, with reference to the safety, accommodation and convenience of the public. * * * Whenever in the judgment of said board it shall appear that any common carrier fails in any respect or particular, to comply with the terms of its charter or the laws of the state, or whenever in their judgment any repairs are necessary upon its road or facilities, or any addition to its rolling stock, or any stations or any additions to or change of its stations or

station houses or any change in its rates of fare for transporting freight, passengers, express or messages, or any change in the mode of operating its line or lines or conducting its business, is reasonable and expedient in order to promote the security, convenience and accommodation of the public, said board shall inform such common carrier of the improvements and changes which it adjudges to be proper, etc."

Section 16 of chapter 207 of the laws of 1911 provides for bringing controversies before the Board of Railroad Commissioners by complaint as was done in this case. Sections 17 and 18 of the same chapter relate to the report and final order of the Commission and to the service thereof. All of the proceedings in this case have conformed to the requirements of these statutes. By section 51 of chapter 207 of the laws of 1911 it was provided that:

"The Board of Railroad Commissioners is hereby vested with full jurisdiction to require any common carrier doing business in this state to install any facility necessary for the safety, convenience and accommodation of the public including telegraph lines and instruments and operators therefor, and telephone lines and instruments."

By the provisions of chapter 263 of the laws of 1915 of said state, jurisdiction was conferred upon the Board of Railroad Commissioners to require railway companies to install stock yards at their several stations. This chapter amended chapter 267 of the laws of 1909. Section 1 of the original statute was as follows:

"Every railroad company operating in the State of South Dakota shall when ordered by the railroad commissioners erect and maintain at all stations suitable stockyards for the care and keeping of cattle and other live stock to be shipped over their line, and shall provide said yards with suitable feed racks and watering troughs, and shall provide a supply of water if practicable, connecting directly with such watering troughs in said yards. Such feed racks, watering troughs and water supply shall be so provided on or before January 1st, 1910, unless the Board of Railroad Commissioners shall, by its order, excuse such company from complying herewith."

Section 1 of the amendment contained in chapter 263 of the Laws of 1915 is as follows:

"Full power and authority is hereby vested in the Board of Railroad Commissioners of this State to require all railway companies doing business in this state to erect and maintain at any station in this state proper and suitable stockyards for the care and keeping of live stock of every description, together with such feed troughs and racks, watering troughs, and water supply as in the discretion of the said Board of Railroad Commissioners may be necessary."

Jurisdiction over scales used at stock yards for weighing live stock was conferred upon the Board of Railroad Commissioners by chapter 270 of the laws of 1915 of the state of South Dakota. This act provides for the testing and inspection of scales. Section 1 thereof is as follows:

"The Board of Railroad Commissioners of this state shall have the power to prescribe and enforce reasonable rules and regulations for the weighing of cars and of freight offered for shipment in carload lots and of live stock at stock yard scales, and of hay, grain, wood, coal and like subjects of commerce when weighed in ton lots in this state. All track scales and all other scales in this state used by common carriers or by shippers for the purpose of weighing cars or freight offered for shipment in carload lots, and all stock scales at stock yards and all private, farm and town and city scales used in weighing hay, grain, wood, coal and like subjects of commerce when weighed in ton lots shall be under the supervision and control of the Board of Railroad Commissioners and be subject to inspection by the Commission."

In its report of this case the Board of Railroad Commissioners very properly, as we believe, propounded the question:

"If the carriers are not to furnish scales for the weighing of live stock at their stock yards, by whom will these facilities be furnished? * * * Must each individual shipper and each firm engaged in buying and shipping live stock at a certain station furnish his or their own stock yards scale?"

During a considerable period of time the railroad companies of the country have consistently followed the practice of providing scales properly equipped for weighing live stock

at their stock yards. The shippers of live stock everywhere have come to rely upon the existence of such facilities in connection with the yards provided for the convenient detention and loading of their livestock. The railroads have always recognized the convenience, desirability and necessity of the same. A very considerable hardship will result to shippers if once the policy is adopted by the railroads to abandon the use of scales and to refuse to provide scales at station stock yards. It should be borne in mind that although such stock scales may, without protest by the railway companies, be used occasionally by persons dealing in live stock otherwise than in connection with shipments completed or about to be made, still there can be no doubt of the very substantial use made of such scales by actual shippers in connection with the loading of live stock for shipment. When used for that purpose it cannot well be denied that such scales are a transportation convenience and serve a real and substantial need of shippers. It may be true that the railway company is not particularly benefited by the information which the shipper acquires as to the weight of his shipments, and the railway company may not be benefited by the extra care the shipper can exercise in loading his stock in cars because he can weigh them before they are loaded; and while it is true that the weights taken at stock yard scales are not the basis upon which freight charges are computed, still railway companies do furnish, and are, in many instances, properly required to furnish, facilities which contribute to the convenience and to the accommodation of the public, without direct benefits to the carriers. Much of the expense that has been incurred in the construction of passenger depots, particularly in the larger terminals of the country, has served greatly to improve the conditions under which persons travel by railway. In many of such depots every want of the traveller is anticipated and every conceivable device is provided for his comfort and welfare. There is perhaps no direct advantage to the carrier that provides these things. Illustrations of this fact might be multiplied many times. It is well known that in many respects the demands of the public are exacting and it is also well known that for the most part it has been the policy of railroads, as well as of public regulatory commissions, to provide those things which make for the safety, convenience and economy of transportation of persons and property. Whenever it appears, as it does appear in this

case, that shippers are actually placed at a disadvantage in loading stock at a station where a stock yard scale has not been provided, we believe that at once it becomes evident that stock yard scales are a necessary transportation requirement.

Viewing this case entirely upon its own merits, and upon the record of established facts showing the situation existing at Albee, we submit that the judgment of the supreme court of South Dakota and the final order made by the Board of Railroad Commissioners of this state, should be in all things affirmed by the Court.

Respectfully, submitted,

CLARENCE C. CALDWELL,

Attorney General,

Sioux Falls, South Dakota.

P. W. DOUGHERTY,

Pierre, South Dakota.

OLIVER E. SWEET,

Assistant Attorney General,

Pierre, South Dakota.

Opinion of the Court.

GREAT NORTHERN RAILWAY COMPANY v.
CAHILL ET AL., COPARTNERS AS REDMAN &
CAHILL, ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH
DAKOTA.

No. 124. Argued January 13, 1920.—Decided May 17, 1920.

An order of a state railroad commission requiring a railroad to install and maintain cattle scales, passed to facilitate trading in cattle and not for any reason having substantial relation to their transportation, violates due process of law. P. 75. *Great Northern Ry. Co. v. Minnesota*, 238 U. S. 340.
40 S. Dak. 55, reversed.

THE case is stated in the opinion.

Mr. E. C. Lindley, with whom *Mr. M. L. Countryman*, *Mr. F. R. Aikens* and *Mr. H. E. Judge* were on the brief, for plaintiff in error.

Mr. Oliver E. Sweet, Assistant Attorney General of the State of South Dakota, with whom *Mr. Clarence C. Caldwell*, Attorney General of the State of South Dakota, and *Mr. P. W. Dougherty* were on the brief, for defendants in error.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

In *Great Northern Ry. Co. v. Minnesota*, 238 U. S. 340, the question was whether an order of the Railroad & Warehouse Commission of Minnesota directing the railway to install at a named station a cattle-weighing scale was rightly sustained by the Supreme Court of the State. It

was found by that court (a) that out of 259 stations on the railway line in Minnesota where stock yards for handling cattle existed there were but 54 supplied with cattle-weighing scales, all of which the railway had voluntarily installed; (b) that although such scales had no direct part in transportation, they were convenient in stock dealings and a station possessing one had an advantage over a place where none existed; in fact, that at the 54 stations where they had been voluntarily installed it had come to pass that they were used, not by shippers for the purposes of their transportation business, but by those who bought and sold cattle.

Coming to consider the contention of the railway that the order to put in the scales was repugnant to the Fourteenth Amendment as a taking of its property without due process, since as a carrier no obligation rested upon it to put in the scales, it was pointed out that the test was whether the order was so arbitrary and unreasonable as to exceed the power of government, or was justified by the public necessities which the carrier could lawfully be compelled to meet. Holding that as the duty of the railway was confined to furnishing appliances for its business of transportation and that cattle scales were not of such a character it followed that the railway could not be compelled to supply them as a means for building up the business of trading in cattle however much the public might be benefited thereby, the defense of the railway was maintained and the order of the Commission was held to be wanting in due process and void. The result, it was pointed out, could not be avoided by the suggestion that the order was intended to correct a discrimination which existed in favor of certain stations which had scales, since in substance to say that would be to correct one discrimination by creating another.

Shortly before the argument in this court of the *Minnesota Case* just referred to, the firm of Cahill and Redman

petitioned the Board of Railroad Commissioners of South Dakota for an order requiring the Great Northern Railway Company to install and maintain a cattle scale adjacent to its cattle yards at Albee station. It was alleged in the petition that no means otherwise of weighing cattle existed at Albee; that the public necessities of the cattle trade required the scale and that the number of cattle shipped from the place justified the outlay by the railway.

The railway answered denying any duty on its part to install the scale and asserted that to compel it to put the scale in would deprive it of its property without due process and would besides deny it the equal protection of the laws, both in violation of the Fourteenth Amendment.

At the hearing which followed there was no showing that any cattle had been shipped over the railway into Albee. It was indisputably established, however, (a) that not only the defendant railway but the other roads operating in the State of South Dakota had at some of their stations installed stock yard scales which presumably, in the absence of all proof to the contrary, had been voluntarily installed; (b) that all shipments of cattle from Albee during the preceding three years amounted only to 56 carloads, all of which were moved in interstate commerce, that is, to St. Paul, Minnesota, and that with regard to less than carload lots two cattle shipped in intrastate commerce constituted the sole movement; (c) that the universal rule on all railroads throughout the United States is to determine the weight of cattle shipped in carload lots, for the purposes of ascertaining the freight charges, not by weight taken on scales at the point of shipment, but by a track scales at or adjacent to the point of delivery; (d) that the business of dealing in cattle at Albee would be facilitated and probably increased by the existence there of a cattle scale where cattle dealt in could be weighed, and that the public want in this respect had come to be increasingly felt since the removal by its owner of a

private scale which the public had used at a time previous to the demand made upon the railway to install the cattle scale here in question.

The Commission in its findings, while pointing out that the complainants had testified that, besides the benefit to the public, there would be an advantage to shippers by the establishment of the scale as it would enable the shippers to load their cattle so as to avoid any loss resulting from a failure to bring the loaded car up to the minimum weight required for carload shipments, added the following: "The testimony of the other witnesses, including those appearing for the railway company, is to the effect that the only use to which a stock scale is put is for the accommodation and convenience of stock buyers and persons making sales of live stock to the buyers at stockyards in arriving at the weights as to the basis for the purchase and sale."

In the meanwhile the *Minnesota Case* had been decided and therefore, when the Commission came to apply the law to the facts by it found in this case, it was called upon to determine how far the ruling in that case deprived it of power to grant the relief prayed in this. Discharging that duty, it held that the *Minnesota Case* was inapplicable because in South Dakota there was a common knowledge that railroad cattle scales when established were for the benefit of both the public and shippers, enabling all who took cattle into the railroad yards whether for shipment or otherwise to ascertain their weight. After referring to the relation in certain aspects which cattle scales when installed bore to carload and less than carload shipments and that a law of the State provided for the inspection of cattle scales when installed by railways at their cattle yards, it was pointed out that, in accordance with many adjudged cases establishing that it was a part of the duty of a carrier to install stock yards in which to hold cattle intended for shipment and to receive inbound cattle when unloaded, it had by further legislation been made the duty of carriers

to establish stock yards at their stations. Declaring that no difference in principle existed between the duty to furnish stock yards and the duty to install stock scales, the conclusion of the Commission was thus summed up:

"After a very careful examination of the evidence in this record, this commission is of the opinion and finds that live stock scales are a necessary facility at stockyards for the weighing of live stock received for the purposes of shipment, not only for the convenience of the public at large, live stock buyers and individual shippers, but in the necessary weighing preliminary to properly loading and subsequent to the unloading of live stock at such stockyards, and that there is an actual public necessity for the installation of a stockyards scale at the stockyards of the defendant at its station at Albee, in Grant County, in this state."

Conforming to these conclusions, the order awarded directed the installation of a stock scale of a certain capacity "in such a manner as to permit of the weighing of live stock loaded into and unloaded from cars at that station, as well as the weighing of stock received into the stockyards at Albee."

An intermediary court to which the case was removed held that as the furnishing of a stock scale was no part of the duty of a common carrier, the railway could not be compelled to furnish it without taking its property without due process of law, and that this result would be all the more flagrantly brought about by compelling the railway to furnish the scale upon the theory that if furnished it would afford a facility for the trading in cattle at the place where it was installed.

The complainant and the Board of Railroad and Warehouse Commissioners, as appellants, in invoking the reversal of the judgment of the intermediary court and the affirmance of the order of the Board, as stated by the Supreme Court of the State, in that court relied solely upon

two grounds: "First, that local buyers and sellers of live stock have the right to demand the installation of stockyard scales for their own convenience in buying live stock; and second, that it is the duty of the carrier to furnish the shipper such facilities as will enable him to avoid underloading cars where the rate is fixed upon minimum loads, and to ascertain the cost of shipping stock in a car in excess of the minimum carload weight."

Disposing of the first of these contentions the court said: "The fallacy of the first proposition is so clear that discussion would be idle. The carrier owes no duty to the local buyer or seller of live stock until the stock is tendered at the stockyards for shipment."

In passing upon the second proposition the court quoted a passage from a text book (10 Corpus Juris, 59, 79) in which, after stating the general duty of a common carrier to furnish appliances necessary or appropriate for discharging its duties as a common carrier, it was declared: "The duty of a carrier of live stock, it is said, cannot be efficiently discharged without the aid of pens or yards in which the live stock offered for shipment can be received and handled, with safety and without inconvenience to the public, before being loaded in the cars in which they are to be transported; and such duty is strictly analogous to the duty of the carrier to construct and to maintain a secure depot for inanimate freight."

Applying such doctrine the court, without citation of authority or reference to any legislative enactment or administrative practice supporting the view, and without referring to the South Dakota statutes relied upon by the Board, making it obligatory upon the carrier to put in cattle pens at all stations, without imposing any such duty to put in cattle scales, but on the contrary giving power only to inspect such scales when put in, held, wholly as a matter of first impression, that the identity between the two (cattle yards and cattle scales) was so complete that

76.

Syllabus.

the obligation which existed to erect cattle yards at every station also established the duty to install a cattle scales at every station. The judgment of the intermediary court was therefore reversed and the order of the Board affirmed.

Eliminating, as this conclusion did, all the questions pressed before the Board obviously with the purpose of taking the case out of the reach of the *Minnesota* decision, based upon a supposed duty to put in scales because of the advantage which would result to dealers in cattle, it clearly follows that this case is decisively controlled by the ruling in the *Minnesota Case*, and therefore leaves us only the duty to apply that ruling. Coming to do so, the judgment below is therefore reversed and the cause remanded with directions for further proceedings not inconsistent with this opinion.

It is so ordered.
